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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No._____

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Your petitioners Omri E. Daniels, Jr., Barge Hiskey and Bentley M. McMullin respectfully petition that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment of that court entered on August 19, 1955, in an action in which in that court the petitioners were appellants and the respondent C. Sewell Thomas was appellee.

A. THE OPINIONS OF THE COURTS BELOW.

In this case the United States District Court for the District of Colorado issued two memorandum opinions and orders, neither of which is reported and both of which appear in the appendix record (A.R. 14; A.R. 41;—see note 1). The United States Court of Appeals for the Tenth

Note 1: References to the appendix record used in the Court of Appeals are indicated as A.R. ....; references to the record on certiorari are indicated as R. .....

Circuit issued an opinion which is not yet reported and which appears in the record on certiorari (R. 3) and in the appendix to this petition. No other court has written an opinion relative to any of the matters involved in this proceeding.

B. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the United States Court of Appeals was entered on August 19, 1955 (R. 11). A petition for rehearing was denied on October 3, 1955 (R. 34). The basis for federal jurisdiction in the United States District Court for the District of Colorado is 28 U.S. Code 1331. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S. Code 1254.

C. THE QUESTIONS PRESENTED FOR REVIEW

1. Does the matter in controversy in this case exceed the sum or value of $3,000.00, exclusive of interest and costs.

2. Does a United States District Court have jurisdiction of an action to enjoin the enforcement of the void judgment of a state court, and to declare that judgment to be invalid, where jurisdiction is claimed under 28 U.S. Code 1331 on the ground that the matter in controversy, involving the jurisdictional amount, arises under the Constitution of the United States; the claim made being that by reason of the due process of law clause of the 14th Amendment to the Constitution of the United States the judgment of the state court was not merely erroneous but utterly, completely and as a whole null, void and without the jurisdiction of the court which entered it, in that it was entered without the minimum requirements of due process of law, and without demand, notice, pleading, trial, hearing or evidence.

3. Can a United States District Court properly deny jurisdiction of a claim because the court determines, without a hearing on that issue, that the claim is without merit and is subject to a valid defense; and can a United States

Court of Appeals deny jurisdiction and affirm the judgment of a district court in the same manner and for the same reason.

4. Can a United States Court of Appeals properly decide a case upon a statement of the case in the opinion which, in its essentials, is so at variance with the record as to describe a virtually different case; and, if not, is this such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

D. THE CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved in this petition is the due process of law clause of the 14th Amendment to the Constitution of the United States, which, so far as it is here pertinent, is as follows:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ." (1 U.S. Code xxxix).

E. STATEMENT OF THE CASE.

The only question involved in the proceedings in the lower courts and the basic questions involved in the present proceeding is whether the United States District Court for the District of Colorado had jurisdiction under 28 U. S. Code 1331 of the claim stated in an amended complaint tendered for filing by petitioners (A.R. 20-40), leave to file which was denied on the ground that that court lacked jurisdiction (A.R. 43, par. 13).

For purposes of the present argument the facts stated in the tendered amended complaint are not subject to controversy. The following statement of the case is based upon the facts as they are stated in the tendered amended complaint.

Certain lands in Colorado were conveyed to respondent Thomas under such circumstances that he held title thereto as the trustee of a resulting trust (A.R. 27-28). Petitioners Daniels and Hiskey claimed to be the beneficiaries of the resulting trust and to be entitled to a conveyance of the

lands (A.R. 28). Thomas having failed to convey, in 1948 they brought an action against him in the District Court of the City and County of Denver and State of Colorado to compel him to convey the lands to them (A.R. 27-28). In their complaint, they asked for an order directing the conveyance of the property and for an award of damages in the sum of $1,000.00 because of his failure to convey in accordance with his trust obligation (A.R. 28).

To this complaint Thomas filed an answer and three counterclaims (A.R. 21, par. 5). The original complaint and counterclaims were later amended (A.R. 21, par. 6). All of the counterclaims were dismissed except the amended third counterclaim. The amended third counterclaim (A.R. 33-37) is the only counterclaim or other pleading filed by Thomas which is involved in the present proceeding (A.R. 23, par. 13).

In his amended third counterclaim respondent Thomas alleged that any title which he had to the lands in question was held by him as the trustee of a resulting trust (A.R. 35, par. 3). He further alleged that he was unable to determine who was entitled to a conveyance of the property (A.R. 35, par. 4). He alleged that interests in the property were owned not only by petitioners Daniels and Hiskey, but by petitioner McMullin and other persons not here involved (A.R. 35,, par. 4). He asked that McMullin and the other persons be made parties to the action, and that he be instructed as to whom and in what manner he should convey the property (A.R. 36, pars. 1-4). He made no other claim whatever. He did not demand judgment against any one and the amended third counterclaim did not allege any facts which would support a judgment against anyone. He asked only that the cost and expense of obtaining the instructions, including the fees of his attorney, be allowed him out of the property which he held as trustee (A.R. 36, par. 5).

McMullin immediately disclaimed all interest in the property (A.R. 22, par. 7). He was, nevertheless, made a party to the action, but only for the purpose of having the interest, if any, which he held in the property, determined (A.R. 22, par. 7). After he was made a party he filed addi-

tional full disclaimers, and on January 21, 1950, the court entered an order determining that he had no interest in the property whatever (A.R. 22, par. 7). By this same order the action was dismissed and discontinued as to McMullin (A.R. 22, pars. 7, 10). After this, McMullin had no further interest in the litigation and he did not thereafter participate therein as a party (A.R. 22, par. 10).

In 1953 the case came on for trial on the issues raised by the amended third counterclaim (A.R. 23, par. 13). McMullin was given no notice to appear at this trial as a party, and he did not appear as a party either in person or by attorney (A.R. 23, par. 13). Upon the trial no demand was made for the entry of judgment against McMullin nor was it claimed either in the pleadings or verbally or otherwise that he was liable in any way to the respondent Thomas, and he was in fact not so liable (A.R. 23, par. 13). Nothing occurred in the entire proceeding which could have given McMullin knowledge or notice of any such claim to liability (A.R. 23, par. 13). Upon the so-called trial no evidence of any kind relating to any claim or liability on his part was tendered or offered or received or considered by the court (A.R. 24, par. 13). No hearing on the question of the alleged liability of McMullin was ever had at any time in the entire proceeding (A.R. 24, par. 13). Until long after the judgment had been entered McMullin had no notice, knowledge, intimation or reason to suppose that any judgment against him could or would be entered in the action as a result of the so-called trial or otherwise (A.R. 23, par. 13; par. 15).

As to the petitioners Daniels and Hiskey, there was no claim made that they were personally liable to respondent Thomas and there were no facts alleged in the pleadings on which any such liability could be based; no evidence was offered which tended to show any such liability; and no notice was given that judgment would be sought or would be entered against them personally (A.R. 24, par. 14).

In spite of all this, when, on January 6, 1953 (A.R. 24, par. 15) some two months after the trial (A.R. 23, par. 13) and still without notice, the state trial court entered its final judgment determining all of the issues in the case, the

final judgment included a personal judgment against all three of the petitioners—Daniels, Hiskey and McMullin—in the sum of $2,500.00 (A.R. 24, par. 15). This personal judgment was a joint and several judgment, and the individual or several liabilities of the judgment debtors were not specified, nor can they be ascertained from the record, so that the judgment is not divisible (A.R. 24, par. 15). The final judgment gave effect to a prior interlocutory summary judgment previously entered in the action, and by which, without a hearing upon their evidence, the claim of the petitioners Daniels and Hiskey to a conveyance and to damages had been improperly denied (A.R. 24, par. 15; 23, par. 12). It is alleged that by reason of the due process of law clause of the 14th Amendment the entire judgment was utterly null and void and without the jurisdiction of the state court (A.R. 25, par. 20).

The total effect of the final judgment was to assert a liability against all of the petitioners for $2,500.00 (A.R. 24, par. 15) and to deny to petitioners Daniels and Hiskey a conveyance valued at $3,750.00 (A.R. 21, par. 4) and damages in the sum of $1,000.00 (A.R. 21, par. 4). The total loss sustained by the petitioners as a result of the entry of the final judgment and the amount from which they seek relief in this action is $7,250.00, and this is the amount in controversy.

Contemporaneously with the entry of this judgment, the state court entered an order denying a motion for a new trial which, under the laws of Colorado, made it impossible for petitioners to resort to that court for relief from the unauthorized and void judgment (A.R. 24, par. 16).

Petitioners thereupon took an appeal to the Supreme Court of the State of Colorado, where on January 11, 1954, the judgment was affirmed without opinion (265 P. 2d 702) (A.R. 25, par. 17). There is nothing to indicate that the constitutional question was determined or adjudicated by the Colorado Supreme Court.

On May 1, 1954, the petitioners filed their petition in this court in accordance with 28 U. S. Code 1257 for a writ of certiorari to review the judgment of the Colorado

Supreme Court on the ground that the judgment was entered contrary to the provisions of the due process of law clause of the 14th Amendment (No. 718, October Term, 1953) (A.R. 25, par. 18). The petition was denied on June 7, 1954 (347 U. S. 1017; A.R. 25, par. 18). The denial of the petition supported the contention of the respondent in that proceeding that the federal question had not been raised in the courts of Colorado. The denial of the petition for a writ of certiorari exhausted all right of appeal and left the petitoners without remedy except by a direct proceeding to enjoin the enforcement of the judgment.

In 1954 the petitioners began the present action in the United States District Court for the District of Colorado to enjoin the respondent Thomas from enforcing the judgment, alleging that, by reason of the manner in which the judgment had been obtained, it was void and without the jurisdiction of the state court under the due process of law clause of the 14th Amendment (A.R. 1-4). The jurisdictional basis of this action was 28 U.S. Code 1331. There was no diversity of citizenship.

The petitioners moved for a temporary injunction, to which the respondent filed an "answer to motion for temporary injunction" (A.R. 9-12). An informal stay of execution was later agreed to. The respondent also filed a motion to dismiss the original complaint for lack of jurisdiction (A.R. 5). By this motion, which was supported by affidavit, he attempted to show that the state court judgment was properly entered, notwithstanding the allegations of the complaint, and that its validity was res adjudicata (A.R. 5-9). All of the matters set forth in this motion, as well as in the answer to motion for a temporary injunction, related to the merits of the controversy and to the right of petitioners to ultimately recover on their complaint. A hearing was had on this motion, at which both the answer to motion for temporary injunction and motion to dismiss for lack of jurisdiction were considered, together with a letter referred to in the motion to dismiss, and upon these documents alone the District Court found that it was without jurisdiction (A.R. 15, 18). The District Court held that the denial of the right to a conveyance and to damages was of no value in computing the jurisdictional amount,

that the judgment of the state court was not void and that the question of the validity of the state court judgment was res adjudicata.

The court then gave petitioners leave to tender for filing an amended complaint, and an amended complaint was tendered (A.R. 20-40). The respondent Thomas then filed a motion to deny leave to file the tendered amended complaint for want of jurisdiction (A.R. 40). This motion was submitted on briefs (A.R. 41 at (71)) and was granted. Finally, and on November 5, 1954, the action was dismissed for lack of jurisdiction (A.R. 43, 44).

In 1954 an appeal was then taken to the Circuit Court of Appeals for the Tenth Circuit in accordance with 28 U. S. Code 1291 (A.R. 44). The statement of points relied on related only to the question of jurisdiction (A.R. 45, 46). On August 19, 1955, the judgment of the District Court was affirmed (R. 4). The Court of Appeals held that the judgment was not void, that the validity of the judgment was res adjudicata, and that the District Court was therefore without jurisdiction.

A petition for rehearing, calling to the attention of the Court of Appeals certain questions of law believed to require a rehearing, and directing its attention to inaccuracies in its opinion, was duly filed (R. 12), but was denied without change or modification of the opinion (R. 34).

F. THE REASONS FOR GRANTING THE WRIT.

1. *The decision of the Court of Appeals on the question of jurisdiction is in conflict with the applicable decisions of this court and of other courts.*

Jurisdiction exists in the present case if the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution of the United States (28 U. S. Code 1331).

(a) *The matter in controversy exceeds the jurisdictional amount.*

The District Court held that the matter in controversy did not exceed the jurisdictional amount. The Court of

Appeals did not mention the question as to the jurisdictional amount. This may have indicated that the Court of Appeals was satisfied that the jurisdictional amount was shown; but since the opinion is not clear as to this point, the following decisions are cited:

So far as the declaratory aspect of this case is concerned, this court has never stated on what basis the jurisdictional amount is to be determined, but the Courts of Appeals are in agreement that in actions for declaratory judgments the jurisdictional amount is determined by the maximum amount or value of the claim as to which a declaration is sought.

Bell v. Philadelphia L. Ins. Co., 78 F. 2d 322, 323 (CCA 4—N.C.—1935)

Stephenson v. Equitable Life Assn. Soc., 92 F. 2d 406, 410 (CCA 4—Va.—1937)

Davis v. American Foundry Equip Co., 94 F. 2d 441, 443 (CCA 7—Ill.—'38)

United Enterprises v. Dubey, 128 F. 2d 843, 844 (CCA 5—Fla.—1942)

Hardware Mutual Cas. Co. v. Schantz, 178 F. 2d 779, 780 (CA 5—Tex.—1949)

Bankers Life Co. v. Jacoby, 192 F. 2d 1011, 1012 (CA 9—Cal.—1951)

Landers, Frary & Clark v. Vischer Prod. Co., 201 F. 2d 319, 324 (CA 7—Ill.—1953)

In actions for injunctive relief, the jurisdictional amount is the value to the plaintiffs of the right sought to be protected by injunction.

Scott v. Donald, 165 U. S. 107, 114-115; 41 L. Ed. 648 (1897)

Hunt v. New York Cotton Exch., 205 U. S. 322, 336; 51 L. Ed. 821 (1907)

Packard v. Banton, 264 U. S. 140, 142; 68 L. Ed. 596 (1923)

See also 30 A.L.R. 2d 602, 621, note.

The value of the right as to which a declaration is sought and the value to the petitioners of the right sought to be protected by injunction is the same. In either case the value involved is the value of the right to be free from the loss caused by the void state court judgment. The judgment imposes upon all of the petitioners a liability for $2,500.00 and at the same time deprives two of them of the right to a conveyance valued at $3,750.00 and of the right to damages in the sum of $1,000.00. The judgment involves a total loss to all of the petitioners of $7,250.00. If they are freed from the liability and loss imposed by the judgment, they will benefit in the total amount of $7,250.00. All of these items are imposed by the same judgment; all of the parties are properly and necessarily joined in the same action; and the total of the items therefore constitutes the jurisdictional amount.

Shields v. Thomas, 17 How. 3, 15 L. Ed. 93 (1855)

Handley v. Stutz, 137 U. S. 366, 369; 34 L. Ed. 706 (1890)

Marshall v. Holmes, 141 U. S. 589, 595; 35 L. Ed. 870 (1891)

Troy Bank v. Whitehead & Co., 222 U. S. 39, 40-41, 56 L. Ed. 81 (1911)

Gibbs v. Buck, 307 U. S. 66, 71-76 83 L. Ed. 1111 (1939)

This amount is not affected by the possibility that there may be defenses to all or any part of the amount claimed.

Smithers v. Smith, 204 U. S. 632, 642; 51 L. Ed. 656 (1906)

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 288; 82 L. Ed. 845 (1938)

Bell v. Preferred Life Assn. Soc., 329 U. S. 238, 242; 88 L. Ed. 15 (1943)

(b) *The matter in controversy arises under the Constitution of the United States.*

On this aspect of the question of jurisdiction the opinion of the Court of Appeals is in direct conflict with the decisions of this court.

Bell v. Hood, 327 U. S. 678, 685; 90 L. Ed. 939 (1946) was a case similar in its facts to the present case, in which this court, in the majority opinion, says that if the outcome of the case depends upon the construction to be given to the Constitution of the United States, federal jurisdiction is present. This court uses the following language (p. 685):

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court had jurisdiction."

Applying this language to the present case, we find that jurisdiction is present. In the present case the petitioners contend that by reason of the due process of law clause of the 14th Amendment the judgment of the state court was null, void and without jurisdiction (A.R. 25-26, par. 20). The right of the petitioners to recover depends upon whether the due process of law clause, properly construed, renders the judgment of the state court null, void and without jurisdiction. The outcome of the case depends upon the construction to be given the Constitution and upon the effect of the Constitution upon the rights of the litigants. Since that is true, and since the jurisdictional amount is present, the District Court has jurisdiction.

The decision of the Court of Appeals was also contrary to the decision of this court in the case of

> *American Surety Co. v. Baldwin,* 287 U. S. 156, 164; 77 L. Ed. 231 (1932)

a case involving an injunction to restrain the enforcement of the judgment of an Idaho state court alleged to be void for lack of notice, in which this court said:

> "The surety company was at liberty to resort to the federal court regardless of citizenship, because

entry of the judgment without notice, unless authorized by it, violated the due process clause of the 14th Amendment" (p. 164).

Jurisdiction to enjoin the enforcement of the judgment of a state court entered without due process of law was also upheld by this court in

Simon v. Southern Ry. Co., 236 U. S. 115, 123; 59 L. Ed. 492 (1914), and

Atchison, Topeka and Santa Fe Co. v. Wells, 265 U. S. 101, 103; 68 L. Ed. 928 (1923)

Although the court denied relief, it considered on the merits and thereby exercised jurisdiction in the case of

Sargeant v. Grimes, 70 F. (2d) 121 (CCA 10—1934)

a case almost identical in its facts with the present case. Such relief is not prohibited by the provisions of 28 U. S. Code 2283 (formerly Sec. 265, Judicial Code; 28 U. S. Code 379).

Marshall v. Holmes, 141 U. S. 589, 599-600, 35 L. Ed. 870 (1891)

Simon v. Southern Ry Co., 236 U. S. 115, 123; 59 L. Ed. 492 (1944)

Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, 262; 66 L. Ed. 658 (1921)

Sovereign Camp, Woodmen of the World v. O'-Neill, 266 U. S. 292, 298; 69 L. Ed. 293 (1924)

The Court of Appeals says, however, that

"It is a principle as old as our dual state and federal judicial systems that a federal court is without jurisdiction to interfere with a judgment in a state court action in which the state court had jurisdiction of the subject matter and of the parties thereto" (Opinion, p. 4).

This rule, is, of course, subject to certain exceptions. Federal courts grant relief against judgments obtained by

fraud, as in *Marshall v. Holmes,* supra, or against judgments void for want of notice, as in *Simon v. Southern Ry. Co.,* supra. The Court of Appeals itself states one of the exceptions in the next sentence of its opinion, saying:

> "It is only when the judgment of a state court is void either because that court lacked jurisdiction of the subject matter or of the parties to the action, or because it entered a judgment which it had no power to enter under the law, that such judgment may be reviewed in a federal court." (Opinion, p. 4).

The present case comes clearly within this exception. The question before the court in the present case—to use the language of the Court of Appeals—was whether the state court "lacked jurisdiction of the subject matter or of the parties to the action" or had "entered a judgment which it had no power to enter under the law." The tendered amended complaint alleges that both the interlocutory and final judgments

> "were and are arbitrary, capitious and non-judicial acts, and are utterly and completely and as a whole null, void and of no force or effect and that said court had no power to grant or enter the same and that they were and are beyond the jurisdiction of said court" (R. 26, lines 5-9).

These allegations present a claim for relief which, even according to the opinion of the Court of Appeals, is within the federal jurisdiction.

In support of its statement, just quoted, that "a federal court is without jurisdiction to interfere with a judgment in a state court action in which the state court had jurisdiction of the subject matter and of the parties thereto" (Opinion, p. 4), the Court of Appeals cited (Opinion, p. 4, note 4)

> *Rooker v. Fidelity Trust Co.,* 263 U. S. 413 (1923)
>
> *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932)

Grubb v. Public Utilities Comm'n, 281 U. S. 470 (1930)

Parnacher v. Mount, 207 F. 2d 788 (10th Cir. 1953) *cert denied*, 347 U. S. 917 (1954)

Hurley v. Lindsay, 207 F. 2d 410 (4th Cir. 1953)

Spencer v. Gypsy Oil Co., 142 F. 2d 935 (10th Cir. 1944) *cert. denied*, 323 U. S. 798 (1945)

Noland v. Noland, 111 F. 2d 322 (9th Cir.), *cert. denied*, 311 U. S. 670 (1940)

Williams v. Tooke, 108 F. 2d 758 (5th Cir.), *cert. denied*, 311 U. S. 655 (1940)

Hendron v. Yount-Lee Oil Co., 108 F. 2d 759 (5th Cir.) *cert. denied*, 311 U. S. 664 (1940)

Borland v. Johnson, 88 F. 2d 376 (9th Cir.), *cert. denied*, 302 U. S. 704 (1937)

Daniel B. Frazier Co. v. Long Beach Township, 77 F. 2d 764 (3d Cir. 1935)

Fryberger v. Parker, 28 F. 2d 493 (8th Cir. 1928)

Lake v. Central Sav. Bank, 27 F. 2d 847 (9th Cir. 1928), *cert denied*, 279 U. S. 836 (1929)

Helbush v. Helbush, 53 F. 2d 704 (S.D. Cl. 1931)

Application of Heller, 39 F. Supp. 310 (M.D. Pa. 1941)

Chirillo v. Lehman, 38 F. Supp. 65 (S.D.N.Y. 1940), *aff'd per curiam*, 312 U. S. 662 (1941)

With the exception of *American Surety Co. v. Baldwin*, supra, which supports our contentions, these authorities have no possible bearing upon the present case. In not one of the remaining cases cited was there lack of notice or lack of hearing; in every one of them there had been due notice, the parties had been before the court, there had been a hearing, and the question raised in the federal court had been already passed upon by the state court. The cases cited are therefore characterized as appellate in nature, and hence beyond the jurisdiction of a federal district

court. The present case, on the contrary, involves a judgment which was obtained without notice, without a hearing, without evidence and without any consideration of the federal question now urged upon this court. The present case therefore does not have the slightest resemblance to an appellate proceeding. It is a new action, begun to obtain relief against a judgment creditor who, if not restrained, will unconscionably enforce a judgment which has no legal or equitable basis whatever, and which is, in fact, a non-judicial act. In such a situation there is nothing to appeal from, and a proceeding to enjoin enforcement of the judgment can have no appellate significance. This distinction is clearly expressed by this court in

Marshall v. Holmes, 141 U. S. 589, 598; 35 L. Ed. 870 (1891)

and the distinction was noted and applied to a case similar to the present case in

Firestone Tire and Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 815 (CCA 4—1922)

The regularity with which such cases have been brought before this court for review suggests that this area of federal jurisdiction is a trouble spot, and that this source of uncertainty and difficulty should be eliminated by a clarifying decision of this court.

The constitutional guaranties depend for enforcement not only upon the federal courts, but upon the state courts. The case at bar affords a clear and needed opportunity to again state, and to leave no room for further question, that there is a point beyond which the failure of a state court to observe its duty to protect litigants from violations of the Constitution of the United States will not pass unnoticed in the federal courts.

It has never been more important than it is today for this court to hold the line not only against open violations of the Constitution, but against the denial of constitutional rights by the more fatal process of judicial attrition.

The cases referred to are based upon the conception that the federal courts do not have jurisdiction to review

cases which have been once properly heard by a state court. We venture to suggest that it is not lack of jurisdiction, but comity, which prevents federal action in such cases. At any rate, a clarification of the word jurisdiction as applied to such cases would certainly be of great value in disposing of this kind of cases as they arise in the future.

The judgment of the state court was null, void and without the jurisdiction of that court notwithstanding the fact that the state court originally had jurisdiction of both the subject matter and the parties. By acting contrary to the constitution requirement of due process, the state court lost whatever jurisdiction it had originally possessed.

In the case under consideration it is alleged that the judgment was not responsive to the pleadings and that this defect was not cured by amendment or by evidence or by a trial of an issue upon which the judgment could have been entered. This rendered the judgment utterly null and void —not merely erroneous—even though the court otherwise had jurisdiction.

Reynolds v. Stockton, 140 U. S. 254, 255-6; 35 L. Ed. 464 (1890)

Rude v. Buchhalter, 286 U. S. 451, 460; 76 L. Ed. 1221 (1932)

Hume v. Robinson, 23 Colo. 359, 361-362; 47 P. 271, 271-272 (1896)

Hough v. Lucas, 76 Colo. 94, 101; 230 P. 788, 791 (1924)

People ex rel. Arkansas Valley Sugar Beet and Irrigated Land Co. v. Burke, 72 Colo. 486, 504; 212 P. 837, 844 (1923)

In the case at bar it is alleged that the order of January 21, 1950, had disposed of the issues as to petitioner McMullin and had dismissed and discontinued the proceeding so far as he was concerned, and that, as to him, the judgment was thereafter entered without notice. Judgments similarly obtained have been held by this court to be utterly void and without jurisdiction, even where jurisdiction had previously existed.

Smith v. Woolfolk, 115 U. S. 143, 148, 149; 29 L. Ed. 357 (1885)

Griffin v. Griffin, 327 U. S. 220, 228; 90 L. Ed. 635 (1945)

In the case at bar it is alleged that the petitioners Daniels and Hiskey were denied a hearing on evidence which supported their claim to relief, and that judgment was entered against petitioner McMullin in the complete absence of any hearing. Notwithstanding the fact that the state court originally had jurisdiction of the parties and of the subject matter, by its denial of a hearing it lost jurisdiction and the resulting judgment was void.

Windsor v. McVeigh, 93 U. S. 274, 282-284; 23 L. Ed. 914 (1876)

To the same effect is

Hovey v. Elliott, 167 U. S. 409, 444; 42 L. Ed. 215 (1897)

Since the judgment was entered jointly and severally and since there is no way by which the individual or several liabilities of the parties can be ascertained, the judgment is void as a whole and in its entirety.

Salisbury v. LaFitte, 22 Colo. App. 90, 108; 123 Pac. 124, 131 (1912)

Fulton Inv. Co. v. Fraser, 76 Colo. 125, 130; 230 Pac. 600, 602 (1912)

Ryan Gulch Res. Co. v. Swartz, 77 Colo. 60, 69; 234 Pac. 1059, 1062 (1925)

Irvin v. Blair, 100 Colo. 349, 352; 68 Pac. (2d) 28, 29 (1937)

Washington Gaslight Co. v. Lansden, 172 U. S. 534, 556; 43 L. Ed. 543 (1898)

(c) *Jurisdiction does not depend upon the petitioners' right to relief.*

Both the District Court and the Court of Appeals determined the question of jurisdiction upon considerations

going to the merits of the controversy and which could be determined only in the exercise of jurisdiction. In holding that the judgment was not void and that its validity was res adjudicata the lower courts decided questions which went to the merits of the controversy.

This not only deprived petitioners of a hearing on the questions of the validity of the judgment and of res adjudicata. It was contrary to the rule stated by this court in

Bell v. Hood, 327 U. S. 678, 682; 90 L. Ed. 939 (1946)

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments (i.e., of the complaint) might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." (327 U. S. 682)

See also

United States v. Williams, 341 U. S. 53, 66; 95 L. Ed. 747 (1950)

All questions going to the merits such as were considered by the lower courts have no relevancy in connection with a determination of the issue of jurisdiction. Such questions can be determined only in the exercise of jurisdiction.

On the record, as it now stands, it cannot be said that the judgment of the state court was valid or that its validity is res adjudicata. The facts which under the decisions of this court render the judgment of the state court null, void and without jurisdiction are alleged in the tendered amended complaint (A.R. 20-40) and, in the absence of

jurisdiction, cannot be controverted. The tendered amended complaint shows that the judgment is void (A.R. 25-26, par. 20). It also alleges that the Supreme Court of Colorado did not adjudicate the Constitutional issue (A.R. 25, par. 19), so that the affirmance of the judgment by the Colorado Supreme Court does not validate the judgment.

Wilson v. Montgomery, 14 Smedes and M. 205, 22 Miss. 206

"The affirmance of a void judgment on grounds not touching but overlooking the invalidity does not make it valid."

To the same effect see

Freeman on Judgments, 5th Ed., Sec. 1228, note 20, p. 2555, and sec. 1187, note 10, p. 2464.

3 Am. Jur. 678, Appeal and Error, Sec. 1167.

31 Am. Jur. 92, Judgments, Sec. 431.

34 C. J. 510, Judgments, Sec. 813, Note 34.

49 C. J. S. 882, Judgments, Sec. 451, Note 94.

Restatement, Judgments, Sec. 1, Comment c; Sec. 2. Comment b.

Vanfleet, Collateral Attack on Judicial Proceedings, p. 14, Sec. 16.

Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 144, 145 (1852)

Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118, 120 (1855)

Chambers v. Hodges, 23 Tex. 104, 110 (1859)

Partridge v. Harrow, 27 Iowa 96, 99 Am. Dec. 643, 644 (1869)

Wilmore v. Flack, 96 N. Y. 512, 521 (1884)

Jones v. Pharis, 59 Mo. App. 254, 259 (1894)

Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 A. S. R. 67, 73 (1895)

Meyers v. Smith, 59 Neb. 30, 80 N.W. 273, 274 (1899)

Crawford v. Pierse, 59 Mont. 371, 185 Pac. 315, 317-318 (1919)

State ex rel Aquamsi Land Co. v. Hostetter, 336 Mo. 391, 79 S. W. (2d) 463, 465 (1934)

"36" Petroleum Cpn. v. Rodden, 139 S. W. (2d) 218, 219 (Tex. Civ. App.—1940)

Langston v. Nash, 192 Ga. 425, 15 S. E. (2d) 481, 484 (1941)

O. C. Whitaker, Inc. v. Dillingham, 194 Okla. 421, 152 P. (2d) 371, 373 (1944)

The Court of Appeals says in its opinion (pp. 8-9):

"The record is not clear whether such issue was in fact presented in the state court action . . ."

If there is any uncertainty, that uncertainty cannot be removed until, in the exercise of jurisdiction, a proper examination of the proceedings in the state courts can be had. There is no way in which this can be done at the present stage of the proceedings. The question of res adjudicata is an affirmative defense, which must be pleaded and proved before it can operate as a bar. That requires the exercise of jurisdiction.

The decision of the Court of Appeals on the question of res adjudicata is based upon the decisions which are not properly applicable. This case is not a case in which the former decision is res adjudicata

". . . as to all issues presented and decided *or which could have been presented and decided*" (emphasis ours; opinion of Court of Appeals, p. 8).

The former decision is res adjudicata in the present case only as to those issues which *were actually determined and adjudicated* in the previous case.

This is true because the parties and issues in the present action are not the same as the parties and issues were

in the action in the state court. The state court action involved additional parties not now in the case (A.R. 37). The issues in the state court action were whether petitioners Daniels and Hiskey were entitled to a deed and damages, whether petitioner McMullin had an interest in the property, and whether the respondent Thomas was entitled to be reimbursed out of the property for his expense in executing the trust. The issue in the present action is whether in arriving at its final judgment the state court so far departed from the requirements of due process of law as to render that judgment null and void.

Since both the parties and the issues in the present action are different from what they were in the state court action, only those issues are barred from litigation in the present action which were actually determined and adjudicated by the state court.

> *Cromwell v. County of Sac,* 94 U. S. 351, 353; 24 L. Ed. 195 (1876)
>
> *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 319; 71 L. Ed. 1069 (1927)
>
> *Larsen v. Northland Transp. Co.,* 292 U. S. 20, 25; 78 L. Ed. 1096 (1934)
>
> *United States v. International Building Co.,* 345 U. S. 502, 504; 97 L. Ed. 1182 (1953)
>
> *Patmar Corp. v. Paramount Theatres Corp.,* 347 U. S. 89, 91; 98 L. Ed. 532 (1953)

Before commencing the present action the petitioners made application to this court for a writ of certiorari to review the judgment of the Supreme Court of Colorado (No. 718, October Term, 1953). The denial of this application on June 4, 1954, before this action was commenced, left the petitioners with no remedy except the present action. The denial imported no opinion as to the merits of the controversy.

> *State of Maryland v. Baltimore Radio Show,* 338 U. S. 912; 94 L. Ed. 562 (1950)
>
> *Agoston v. Commonwealth of Pennsylvania,* 340 U. S. 844; 95 L. Ed. 619 (1950)

(2) *The Court of Appeals did not decide the case presented by the record.*

Regardless of whether or not the Court of Appeals has decided the questions of law which were before it in accordance with the decisions of this court, it was at least required, as an appellate court of the United States, to base its decision upon a correct and accurate statement of the essential points contained in the record. It did not do so, even though there is no dispute as to what the record contains; and when the facts were properly called to its attention by petition for rehearing (R. 12), it still failed to make its opinion confirm to what the record shows.

The departure of the opinion from a factual and true statement of the issues is so extreme that, in the interest of the proper administration of justice, the exercise of the supervisory power of this court can hardly be avoided. A United States Court of Appeals should not be permitted to dispose of a case, rightly or wrongly, upon an opinion which is so excessive in its inaccuracy as the opinion is in the present case. The Court of Appeals did not state or decide the case which is shown by the record.

On page 2 of its opinion the Court of Appeals says:

> "A motion to dismiss, supported by uncontroverted affidavit, for failure to state a cause of action was filed and granted. This appeal challenges the correctness of that judgment."

No motion to dismiss for failure to state a "cause of action" or for failure to state a claim upon which relief could be granted was ever filed in this entire proceeding. The only determination ever made by the District Court was that it lacked jurisdiction to entertain the case. The only question which was raised by the appeal from the judgment of the District Court was the question of jurisdiction.

The question of jurisdiction was a preliminary question, to be decided upon considerations which had nothing to do with whether the petition stated a claim upon which relief could be granted or whether the petitioners might ultimately be found entitled to recover. The Court of Appeals should have decided the preliminary question of

jurisdiction and then, if it determined that the District Court had jurisdiction, it should have sent the case back to the District Court for further proceedings. Instead of doing so it decided a non-existent motion going to the merits of the controversy, a decision which could be made only in the exercise of jurisdiction; it determined that the state court judgment was not void and that its validity was res adjudicata; and it finally held that the District Court did not have jurisdiction. This confused thinking made a correct decision impossible.

On page 3 of its opinion the Court of Appeals says:

> "While it does not so appear in the record, McMullin's statement in the petition in this case that he filed a disclaimer of interest in the property is not seriously challenged and will, therefore, be taken as a fact."

The Court of Appeals speaks as though there had been a trial of the issues and as though the record of the proceedings in the state court had been received in evidence. The Court of Appeals apparently had lost sight of the fact that all that was before the District Court was a tendered amended complaint, leave to file which had been denied for lack of jurisdiction, and that, for the purposes of the present inquiry, the tendered amended complaint constitutes the entire record. The tendered amended complaint alleges

> "7 . . . that the said Bentley M. McMullin *thereupon disclaimed* all interest in said land . . . and that he thereafter and prior to January 21, 1950, filed additional full disclaimers of all interest in and right to receive a conveyance of said land . . ." (R. 22, par. 39; emphasis ours).

Attached to the tendered amended complaint as an exhibit to substantiate its allegations was a certified copy of the order of the state court dated January 21, 1950 (A.R. 37). This order recites

> ". . . that the Involuntary Plaintiff, Bentley M. McMullin and (certain other parties not here involved)

> . . . have no right, title or interest in and to the subject matter of this action, *as evidenced by their respective disclaimers filed herein.*" (R. 318, lines 2-8; emphasis ours).

The record therefore does show that petitioner McMullin had disclaimed. When judgment was entered against him he had no interest in the litigation.

The opinion continues (p. 3):

> "Apparently he (McMullin) did not ask to be dismissed from the action and was continued as an involuntary plaintiff."

The record shows that McMullin did ask to be dismissed from the action and that he was not continued as a party to the litigation. The tendered amended complaint alleges that McMullin

> "did not thereafter (i.e., after he had disclaimed) in any way participate as a party in any of the proceedings which were had as to the merits of said action, and did not file any pleading responsive to said amended third counterclaim, but *moved that said action be dismissed as to him,* which motion was pending and undetermined on January 21, 1950" (R. 22, par. 7; emphasis ours).

The tendered amended complaint also alleges:

> "That on January 21, 1950, said court found and determined, and with the consent of all parties to said proceeding entered an order declaring that the plaintiff Bentley M. McMullin had no interest in said lands, and debarring him from asserting any such interest, and that *said order in effect granted the motion filed by the said Bentley M. McMullin that said action be dismissed as to him,* and that following the entry of said order the said Bentley M. McMullin did not participate in any way whatever in said action as a party thereto, *and that, as to him, said action then stood and thereafter remained discontinued* . . ." (R. 22, par. 10; emphasis ours).

When judgment was entered against him McMullin was no longer in the litigation.

On page 4 of its opinion the Court of Appeals sets forth its understanding of the contentions of the petitioners as follows:

> "In support of their contention that there is presented a federal question of which the trial court had jurisdiction they assert (1) that the state court denied them the right to a trial upon the merits of 'substantial, meritorious, genuine and material issues of fact' and hence the entry of the judgment was beyond the power of the court; (2) that the personal judgment on the counterclaim was entered without due process because Thomas made no claim for personal judgment, only out of the property; (3) that as far as McMullin was concerned he was given no notice that judgment was to be entered against him on the counterclaim and had no opportunity to present a defense or introduce evidence; and (4) that the entry of judgment on the counter claim was the result wholly of bias and prejudice of the trial judge."

This language is based entirely upon the allegations of original complaint (A.R. 1-4), a pleading which was not before the court, and not on the allegations of the only pleading which was before the court, which was the tendered original complaint (A.R. 20-40).

In its point (1) the court states that the petitioners claim "that the state court denied them (petitioners) the right to a trial upon the merits of 'substantial, meritorious, genuine and material issues of fact' . . ." The words "substantial, meritorious, genuine and material issues of fact" appear only in the original complaint (A.R. 2, par. 6), and the remainder of the wording of point (1) is derived from the original complaint (A.R. 3, par. 8). Point (2) follows the language of the original complaint (A.R. 2, par. 7); the tendered amended complaint contains no corresponding language. Point (3) follows the original complaint (A.R. 3, par. 8); it is based on allegations which are not carried over into the tendered amended complaint. Point (4), re-

lating to "bias and prejudice," refers to allegations which were added to the original complaint by amendment (A.R. 5, par. 4), but which were omitted in their entirety when the amended complaint was tendered for filing.

The Court of Appeals could not, therefore, and it did not completely or accurately state the claim made by the petitioners in their tendered amended complaint. The tendered amended complaint alleges that the judgment of the state court was entered as to petitioner McMullin without notice, demand, pleading, hearing, trial or evidence, and as to the remaining petitioners without demand, pleading or evidence, and that it was completely, and as a whole, null, void and of no force or effect whatever and that it was without the jurisdiction of the court which entered it (A.R. 26, pars. 20, 21).

On page 5 of its opinion the Court of Appeals says:

> "McMullin was brought into the case as an involuntary plaintiff by process of the court. While he disclaimed any interest in the property, such disclaimer did not dismiss him from the action. He still remained a party thereto subject to the determination of the right of Thomas to recover damages from the plaintiffs."

We have already shown (this petition, p. 24) that McMullin moved to be dismissed from the action (A.R. 22, par. 7) and that after he had disclaimed, the state court entered an order which terminated the case as far as he was concerned (R. 22, par. 10).

On page 5 of its opinion the Court of Appeals says:

> "McMullin complains of the lack of personal notice of the entry of the personal judgment. The record of the proceedings of the trial in the state court is fragmentary. It cannot be said therefrom whether personal notice was or was not served upon him, but, in any event, and assuming without deciding that he was entitled to personal notice, it is immaterial whether he was handed or received a written notice of the entry of the judgment."

In stating that "the record of the proceedings of the trial in the state court is fragmentary" the Court of Appeals again speaks of the case as though there had been a trial of the issues (see also this petition, page 23). However, there was no trial, and all that we have for consideration are the allegations of the tendered amended complaint which, for present purposes, and in the complete absence of a determination that the court has jurisdiction, cannot be controverted and must be taken as true. The tendered amended complaint alleges (A.R. 23, par. 13):

> "13 . . . that at said trial the involuntary plaintiff McMullin was not given notice to appear as a party and did not appear as a party either in person or otherwise; that upon said trial no demand was made for the entry of judgment against said involuntary plaintiff, nor was it urged upon the trial court that it was claimed that he was in any way liable to the defendant Thomas, either in the pleadings, motions or notices in said action, or verbally or otherwise; and that he was, in fact, not so liable and that in said entire proceeding nothing occurred or took place at any time or in any manner which gave or could have given the involuntary plaintiff knowledge or notice of such claim to liability; . . . and that until said judgment had been entered the said involuntary plaintiff had not notice, knowledge or intimation, nor any reason to suppose that any judgment against him could or would be entered in said action as a result of said trial or otherwise."

It could hardly be more clearly stated that petitioner McMullin had no notice.

On page 6 of its opinion the Court of Appeals says:

> "Notice he must have had both pro se and as attorney for the remaining two appellants, because he took a timely appeal from the trial court's judgment to the Supreme Court."

As to this, the tendered amended complaint alleges (A.R. 23, par. 13) that

". . . until after said judgment had been entered the

> said involuntary plaintiff (McMullin) had no notice, knowledge or intimation nor any reason to suppose that any judgment against him could or would be entered in said action as a result of said trial or otherwise."

The only notice of the entry of judgment which petitioner McMullin was given was a copy of the judgment, received weeks after the hearing was over. The statement by the Court of Appeals that this was sufficient notice to adequately protect petitioner McMullin's rights is simply stupifying. The only notice which could possibly have enabled petitioner McMullin to prevent the entry of the judgment would have been notice in advance of its entry. After the judgment was entered objection in the state trial court was impossible (R. 24, par. 16).

On page 6 of its opinion the Court of Appeals says:

> "The further contention is made that Thomas in his counterclaim did not ask for personal judgment, that he asked only that any judgment obtained be satisfied out of the property. We do not construe his counterclaim to mean that he asked no personal judgment. True, he did not use the word 'personal' when he asked for judgment against plaintiffs, but he did ask for a monetary recovery because of their conduct, and asked that the judgment be satisfied out of the property."

In the action in the District Court of the City and County of Denver the respondent filed three separate and distinct amended counterclaims, but judgment was entered on only one of them—the third. The state court judgment was based solely and exclusively on the amended third counterclaim (A.R. 23, par. 13). The amended third counterclaim is the only counterclaim with which we are concerned. The validity of the judgment depends entirely upon the allegations of and proceedings had under that counterclaim. The other two amended counterclaims were dismissed.

The amended third counterclaim is set out in the record in full (A.R. 33-37). If the court will examine this counterclaim it will see that it does not give the slightest foundation to the statement made by the Court of Appeals.

In the amended third counterclaim the respondent did not "ask for a monetary recovery because of their (petitioners') conduct." Nothing is said in the amended third counterclaim about anybody's conduct. Nothing is said about a monetary recovery from anybody. The respondent did not ask that the judgment against petitioners be satisfied out of the property; he did not ask for judgment against them at all. In the amended third counterclaim the respondent, as the trustee of a resulting trust in real property, asked that he be instructed as to whom and in what manner he should convey the trust property, and that he be allowed his costs and the expense of obtaining the instructions, including the fees of his attorney, out of the property (A.R. 36). This, of course, is the usual procedure in such cases, the transfer of the property being made conditional upon the payment of the costs and expenses. No question of personal liability on the part of anyone is involved in such a proceeding.

The statement that the respondent Thomas "did not use the word 'personal' when he asked for judgment against the plaintiffs" is not supported by the record; the respondent Thomas did not ask for judgment against the petitioners, either personally or in any other way. The statement that "he did ask for a monetary recovery because of their conduct" is pure fiction, not supported by so much as a word of the amended third counterclaim.

On page 6 of its opinion the Court of Appeals continues:

> "That was merely the prayer of his counterclaim. It is well settled that the prayer for relief is no part of the cause of action and that the parties are entitled to such relief and to such judgment as the complaint —the counterclaim in this case—makes out."

If the amended third counterclaim (A.R. 33-37) is carefully examined, it will be found that it does not contain a single allegation which would support a judgment of personal liability against anybody. The Court of Appeals may have confused this counterclaim with one of the other

counterclaims which did allege personal liability, and which were dismissed and are not here involved.

On page 8 of its opinion the Court of Appeals says:

> "Again, assuming without deciding, that the trial in the state court gave rise to a federal issue of due process, it is an issue which could have been tendered in the state trial court . . ."

There was never any possibility of the federal issue of due process being tendered in the trial court. The federal issue arose from the manner in which the judgment was entered. The state trial court did not give any notice of the kind of judgment it was going to render, and there was no opportunity whatever to object to the judgment prior to its entry. After the judgment had been entered, the trial court dispensed with a motion for a new trial, and this made objections in the state trial court impossible (A.R. 24, par. 16).

Dickson v. Horn, 89 Colo. 234, 237; 1 Pac. (2d) 96, 97 (1931).

All of these matters were called to the attention of the Court of Appeals by petition for rehearing (R. 12).

G. CONCLUSION

The writ of certiorari prayed for should be granted.

Respectfully submitted,

BENTLEY M. MCMULLIN,
Counsel for Petitioners

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October 31, 1955

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit dated August 19, 1955.

PAGE 1

Before Bratton, Huxman and Pickett, Circuit Judges. Huxman, Circuit Judge.

PAGE 2

The appellants, Omri E. Daniels, Jr., Barge Hiskey and Bentley McMullin, brought this suit in the United States District Court for the District of Colorado under the Declaratory Judgment Act[1] for a declaratory judgment that a certain judgment rendered against them in the District Court of the City and County of Denver in the State of Colorado, dismissing their claim for relief and entering an affirmative judgment against them in the sum of $2500, was void for lack of due process, and for an injunction against its enforcement. A motion to dismiss, supported by an uncontroverted affidavit, for failure to state a cause of action was filed and granted. This appeal challenges the correctness of that judgment.

A brief review of the state proceedings is essential to an understanding of the question presented. Appellants, Daniels and Hiskey, by their attorney, Appellant McMullin, filed an action in the above named Colorado State court to compel appellee, C. Sewell Thomas, to convey to them with special warranty deed certain lands which he held as trustee. They further sought to recover damages against him for $1000. In his answer Thomas offered to execute a quitclaim deed to whomever the court determined were the owners of the land. He alleged that appellant McMullin had an interest in the controversy and asked that he be made an involuntary plaintiff. He also asked monetary damages of the plaintiffs because of delay and malicious

[1] 28 U.S.C.A. §§ 2201, et seq.

prosecution and that the judgment for damages be satisfied out of the property. McMullin was joined as an involuntary plaintiff. He appeared pro se and also as attorney for the remaining plaintiffs. While it does not so appear in the record, McMullin's statement in the petition in this case that he filed a disclaimer of interest in the property is not seriously challenged and will, therefore, be taken as a fact. Apparently he did not ask to be dismissed from the action and was continued as an involuntary plaintiff and also continued throughout the trial to represent the two remaining plaintiffs, the other appellants here, as their attorney.

The state trial judge concluded that Thomas was not required to execute a special warranty deed. He further entered a personal judgment against all three plaintiffs for damages in the amount of $2500. This judgment was appealed to the Supreme Court of Colorado, where it was affirmed per curiam without written opinion.[2] Appellants' petition for certiorari to the United States Supreme Court was denied.[3] Thereafter appellants instituted this action as set out hereinbefore.

In support of their contention that there is presented a federal question of which the trial court had jurisdiction they assert (1) that the state court denied them the right

to a trial upon the merits of "substantial meritorious, genuine and material issues of fact" and hence the entry of judgment was beyond the power of the court; (2) that the personal judgment on the counterclaim was entered without due process because Thomas made no claim for personal judgment, only out of the property; (3) that as far as McMullin was concerned he was given no notice that judgment was to be entered against him on the counterclaim and had no opportunity to present a defense or in-

[2] See 265 P. 2d 702.

[3] See 347 U.S. 1017.

troduce evidence; and (4) that the entry of judgment on the counterclaim was the result wholly of bias and prejudice of the trial judge.

Because of the conclusion we have reached on the basic question controlling the disposition of this case, it will not be necessary to consider or discuss these contentions separately or in detail. It is a principle as old as our dual state and federal judicial systems that a federal court is without jurisdiction to interfere with a judgment in a state court action in which the state court had jurisdiction of the subject matter and of the parties thereto.[4] It is only when the judgment of a state court is void either because that

court lacked jurisdiction of the subject matter or of the parties to the action, or because it entered a judgment which it had no power to enter under the law, that such judgment may be reviewed in a federal court.

It must be conceded that the state trial court had jurisdiction of the subject matter. In fact, we do not under-

[4] Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Gribb v. Public Utilities Comm'n 281 U. S. 470 (1930); Parnacher v. Mount, 207 F. 2d 788 (10th Cir. 1953), *cert. denied,* 347 U.S. 917 (1954); Hurley v. Lindsay, 207 F. 2d 410 (4th Cir. 1953); Spencer v. Gypsy Oil Co., 142 F. 2d 935 (10th Cir. 1944); *cert. denied,* 323 U.S. 798 (1945); Noland v. Noland, 111 F. 2d 322 (9th Cir.), *cert. denied,* 311 U.S. 670 (1940); Williams v. Tooke, 108 F. 2d 758 (5th Cir.), *cert denied,* 311 U.S. 655 (1940); Hendron v. Yount-Lee Oil Co., 108 F. 2d 759 (5th Cir.), *cert. dnied,* 311 U.S. 664 (1940); Borland v. Johnson, 88 F. 2d 376 (9th Cir.), *cert. denied,* 302 U.S. 704 (1937); Daniel B. Frazier Co. v. Long Beach Township, 77 F. 2d 764 (3d Cir. 1935); Fryberger v. Parker, 28 F. 2d 493 (8th Cir. 1928); Lake v. Central Sav. Bank, 27 F. 2d 847 (9th Cir. 1928), *cert. denied,* 279 U.S. 836 (1929); Helbush v. Helbush, 53 F. 2d 704 (S.D. Cal. 1931); Application of Heller, 39 F. Supp. 310 (M.D. Pa. 1941); Chirillo v. Lehman, 38 F. Supp. 65 (S.D. N.Y. 1940), *aff'd per curiam,* 312 U.S. 662 (1941).

stand appellants to contend otherwise. It is also clear to us that that court had jurisdiction of all three appellants. Certainly it had jurisdiction at all times of Daniels and Hiskey. They instituted the action. McMullin was brought into the case as an involuntary plaintiff by process of the court. While he disclaimed any interest in the property, such disclaimer did not dismiss him from the action. He still remained a party thereto subject to the determination of the right of Thomas to recover damages from the plaintiffs.

McMullin complains of the lack of personal notice of the entry of the personal judgment. The record of the proceedings of the trial in the state court action is fragmentary. It cannot be said therefrom whether personal notice was or was not served upon him, but in any event,

and assuming without deciding that he was entitled to personal notice, it is immaterial whether he was handed or received a written notice of the entry of the judgment. Notice he must have had both pro se and as attorney for the remaining two appellants because he took a timely appeal from the trial court's judgment to the Supreme Court. This he could not have done in the absence of notice of the entry of the judgment. Whatever the form of notice he had, it enabled him to perfect his appeal and preserved his right to a review of the judgment.

The further contention is made that Thomas in his counterclaim did not ask for personal judgment, that he asked only that any judgment obtained be satisfied out of the property. We do not construe his counterclaim to mean that he asked no personal judgment. True, he did not use the word "personal" when he asked for judgment against plaintiffs but he did ask for a monetary recovery because of their conduct and asked that the judgment be satisfied out of the property. That was merely the prayer of his counterclaim. It is well settled that the prayer for relief is no part of the cause of action and that the parties are

entitled to such relief and to such judgment as the complaint—the counterclaim in this case—makes out.[5] But,

PAGE 7

assuming without deciding, that the court should not have entered a personal judgment, that again was an error and does not make its judgment a nullity.

It is our conclusion that the state court had jurisdiction of the subject matter and of the parties to this appeal and that its judgment was not void. At most, and in any event, it only could have been erroneous. The final judgment of the state court is, therefore, res judicata and the federal trial court was, therefore, without jurisdiction to entertain the action.

In Grubb v. Public Utilities Comm'n, 281 U.S. 470 (1930), is found a good statement of the applicable law. The Supreme Court there held that a state judgment was res judicata to all issues presented and decided or which could have been presented and decided. The court held that as to any ground available but not put forward an appellant must abide by the rule "that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." 281 U. S. at 479. There is a great array of authority to the same effect.[6]

PAGE 8

Again, assuming without deciding, that the trial in the state court gave rise to a federal issue of due process,

[5] Colo. R. Civ. P. 54 (c); Snell v. Public Utilities Comm'n, 108 Colo. 162, 114 P. 2d 563,566 (1941); See Michael Del Balso, Inc. v. Carozza, 136 F. 2d 280 (D.C. Cir. 1943); See 49 C.J.S. 112-13.

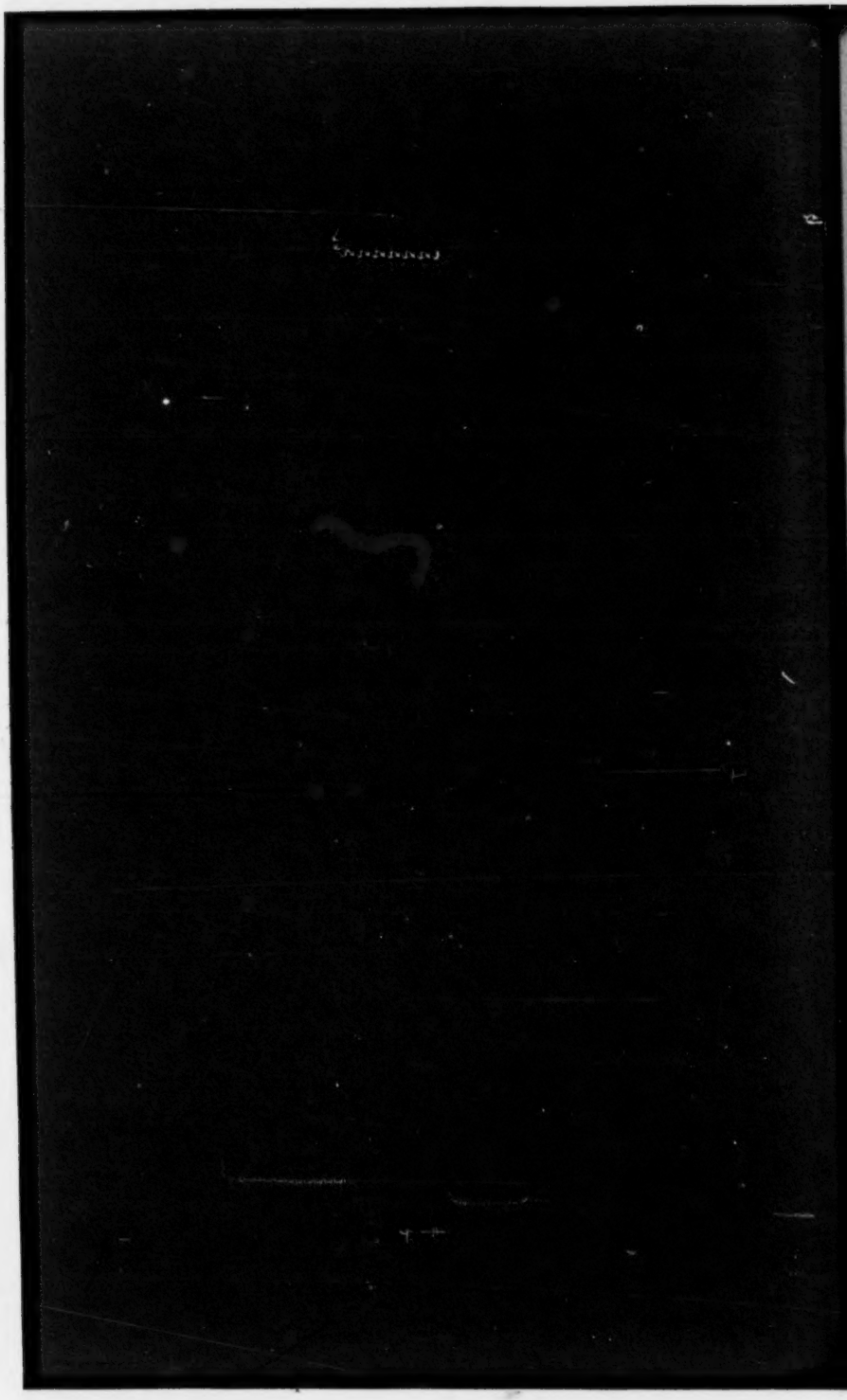
[6] E.g., Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Cromwell v. County of Sac, 94 U.S. (4 Otto) 351 (1876); United States v. California & Oregon Land Co., 192 U.S. 355 (1904); Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927).

it is an issue which could have been tendered in the state trial court and, on appeal, to the state supreme court. The record is not clear whether such issue was in fact presented in the state court action, but in any event under the decision of the *Grubb* case and kindred cases, that issue is now res judicata and appellants were precluded from having that issue litigated in this case.

Because the state court had jurisdiction both of the subject matter and the parties, who were the same as the parties herein, and because it undertook to dispose of the case upon its merits, its judgment was not void. When it became final, it became res judicata, and the trial court in this case was without jurisdiction to review the same.

AFFIRMED.

[redacted]



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 502

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

I.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in the Petition for Writ of Certiorari are not stated in the terms and circumstances of the case as required by Rule 23. The questions should be more properly stated as follows:

1. Does a proceeding to enjoin or have declared void a summary judgment for $2500 and costs rendered against three defendants by a state court involve a controversy exceeding the sum of $3000, exclusive of interest and costs, simply because that judgment finally disposed of a state court action in which a prior summary judgment denying a claim of two of those defendants for $1000 has been rendered, particularly when there is no proof that the claim

against which the summary judgment was rendered is valid or meritorious or has any value whatsoever?

2. Does a Federal Court have jurisdiction under Title 28, Section 1331 to review a State Court judgment against persons who were served with process and were present themselves or by their attorneys at the trial which resulted in judgment, after the judgment was affirmed by the Colorado Supreme Court on a Writ of Error brought and prosecuted by these three persons?

3. Is a Federal Court correct in dismissing a case between citizens of the same state for lack of jurisdiction on motion when there is no showing that more than $3000, exclusive of interest and costs, or a substantial federal question is involved?

II.

STATEMENT OF THE CASE

The statement of the case submitted by petitioners is argumentive and incorrect in many particulars. The more significant of these are the following:

1. The third counterclaim of Thomas in the state court against which judgment against Daniels and Hiskey was rendered was a traditional bill of equity by a trustee seeking instructions, which asked, among other things, for "such other relief as to the court may seem proper." (AR 36) Petitioners's statement of the case (p. 4) ignores this and also ignores the fact that pursuant to an interlocutory order entered in the action in January 1950, Thomas gave a deed to Daniels and Hiskey (AR 7), and any right to title to the property involved in the original state action is not and can not be involved in this federal court suit.

2. The order of the state court did not dismiss or discontinue the state case as to McMullin. The order appears in full (AR 37-40) and there is no mention in it as to dismissal or discontinuance of the case as to McMullin or anyone else. Petitioners' statements to the contrary at the top of page 5 of their petition and elsewhere therein is simply wrong. Petitioners' allegation in their amended complaint (AR 22) that the state court's order in effect

granted the motion of McMullin that the action be dismissed as to him and that the action stood discontinued (whatever that means) as to him must yield to the order itself, which petitioners saw fit to attach as an exhibit to the amended complaint.

3. The statement (p. 5) that thereafter McMullin had no further interest in the litigation is untrue and there is no such allegation in the complaint.

4. The statement (p. 5) that McMullin was given no notice to appear at the trial on the counterclaim is not what the complaint alleges. The complaint alleges "at the trial he was not given notice to appear as a party."

5. The statement (p. 5) that it was not claimed in the pleadings that McMullin was liable to Thomas in any way is not true. The amended counterclaim (Exhibit B) was attached to the amended complaint (AR 29-36) and any allegations in the federal court complaint must yield to the terms of the counterclaim itself which petitioners saw fit to attach as an exhibit to the amended complaint. The circumstances concerning the state case, which petitioners failed to include in their original complaint in the federal case, were put before the court in connection with the motion to dismiss for lack of jurisdiction by affidavits appearing at AR 6-8, to which were attached the pertinent pleadings in the state court case.

6. The statement (p. 5) that McMullin had no notice of judgment against him until long after it was entered does not conform to the complaint which simply alleges that he had no notice of it until after it was entered (AR 24). Of course, it is quite usual for courts not to give advance notice of decisions they propose to reach.

7. The statement (p. 6) that the judgment of January 6th gave effect to a prior interlocutory summary judgment is not correct. That summary judgment was in full force and effect from and after its entry many months before. The summary judgment had denied Daniels and Hiskey any relief in the state court action on their complaint for a deed or damages, and was entered after Thomas had executed and delivered a quit claim deed to the property to

Daniels and Hiskey and that deed had been accepted (AR 7).

8. The statement that the denial of the petition for certiorari filed with this court by Daniels, Hiskey and McMullin in Case 718, October term, 1953, supported the contentions of Thomas that a federal question had not been raised by the state court is incorrect (p. 7). An examination of that petition shows that Thomas simply claimed that any constitutional point was not specifically set up or claimed as required by Title 28, U.C.A. 1257 (3) and was not a clear statement of any legal proposition based on the United States Constitution sufficient to give the Supreme Court the right to review on certiorari (P. 11-12, Brief of Thomas opposing Writ, Case No. 718, October Term, 1953). This was not a claim that the point was not raised at all in the courts of Colorado.

9. The implication that the motion to dismiss for lack of jurisdiction (p. 7) related only to the merits of the action is simply incorrect. This motion raised an issue as to the jurisdictional value involved and showed that the case actually was one to review as if on appeal the action of the state court and the affidavit attached to the motion was directed to the same end.

10. In discussing the decision of the District Court sustaining Thomas' motion to dismiss for lack of jurisdiction, petitioners' statement of the case fails to show clearly that the court, besides holding that no jurisdictional amount was involved, also held that the District Court had no right to set aside the judgment regardless of amount involved because of errors which may have occurred in the state court (AR 17).

III.

ARGUMENT

A.

This case represents an effort by Daniels and Hiskey, who brought a lawsuit with no merit against Thomas in the State District Court, and by McMullin, their attorney, who was later made a party to the case in connection with

the counterclaim, all of whom lost their case in the Colorado State Trial Court and then lost it again in the Supreme Court of Colorado, and then failed to obtain further review on certiorari by the Supreme Court of the United States, to prolong the litigation further, this time in the federal court, for the purpose of having the state court decisions against them reviewed by the federal courts as if on appeal.

B.

THE JURISDICTIONAL AMOUNT REQUIRED BY TITLE 28, U.S.C.A., SECTION 1331 IS NOT INVOLVED IN THIS CASE.

The sum of $3000 is not involved in this action. Clearly any claim to set aside the judgment of $2500 on the counterclaim against McMullin, Daniels and Hiskey involves an insufficient jurisdictional amount. The summary judgment of July 25, 1951, dismissed the complaint of Daniels and Hiskey in the state court. That judgment imposed no liability on anyone except possibly for a few dollars in costs. A claim in this case to set aside that judgment, therefore, involves nothing which can be considered in determining jurisdictional amount. No monetary damages are sought in this case, nor could any be granted in this case, nor could any relief from liability (except for such costs) be granted in this federal case. Daniels and Hiskey in this aspect of the federal case seek simply to be free from a summary judgment which might be a bar to the further prosecution in some case not yet pending of an unfounded claim to covenants of warranty and to damages long barred by Statutes of Limitations.

Title to the property involved in the state case was conveyed to Daniels and Hiskey long before the conclusion of the state case and long before the federal case commenced and any such title or its value or the value of the property could not possibly be involved in the federal case.

In such a situation federal jurisdictional amount is measured by what the rights sought to be protected are worth.

KVOS, Inc. v. Associated Press, 299 U. S. 269.
McNutt v. General Motors Acceptance Corp., 298 U. S. 178.

By the motion to dismiss for lack of jurisdiction in the federal case, Thomas raised an issue as to the jurisdictional allegations of the complaint, and the burden was thus cast on Daniels, Hiskey and McMullin to establish by proof to the satisfaction of the court that the matter in controversy so far as the summary judgment was concerned involved protection of a right of some value.

KVOS, Inc. v. Associated Press (supra).
McNutt v. General Motors Acceptance Corp., (supra).

No evidence of any kind was ever offered on this issue as to any costs awarded in the state court or any other amount. No evidence was offered as to the value of any such alleged rights which they seek to protect. No evidence was offered that any right to be free from the effect of this summary judgment is of any value to Daniels and Hiskey whatsoever.

As a practical matter, if the federal court should declare the state court summary judgment invalid or enjoin reliance on it, that would not determine that Daniels and Hiskey are entitled to any covenants of warranty or any damages. That is a dispute between citizens of the same state and involves purely questions of local law, which would have to be tried in the state court. The federal court could not declare that claim valid or invalid. A decision on the merits in the federal case that the summary judgment is or is not valid would neither add nor detract one cent to or from the assets of Daniels and Hiskey. The summary judgment imposes no lien, charge or cloud on any of their property.

Furthermore, the value of any covenants depends on what the value of the covenants would be as covenants, and not as a conveyance; and their value is only speculative as respects the value of any claim to damages based on a failure to give covenants. Whether any value exists involves an analysis, among other things, of what claim Daniels and

Hiskey now have, whether the claim has any substance, whether the claim is barred by the Colorado statute of limitations, whether a suit would ever be brought on such a claim, whether Thomas has done anything to the title of the property which caused Daniels and Hiskey any damages which could be recovered on any covenant or special warranty and whether if such suit were brought Thomas could set up the summary judgment as a defense or res adjudicata. Such a situation is too speculative to have any value in determining federal jurisdiction.

Kurtz v. Moffitt, 115 U. S. 487.
Carroll v. Somervell (2nd Circuit) 116 Fed 2nd 918.

Farmers and Merchants Bank v. Federal Reserve Bank (DC N. Car.) 274 Fed. 235.

Also the value of a claim, for federal jurisdiction purposes, is not determined by the collateral effect which a judgment in the federal case might have in some other court action in some other court, and any judgment in this case as to the summary judgment could be significant only because of its collateral effect in some other case. Therefore, it is perfectly clear that a claim in respect of the summary judgment involves nothing of value for federal jurisdictional purposes.

Healy v. Ratta, 292 U. S. 263.
New England Mortgage Co. v. Gay, 145 U. S. 123.
Troy v. Evans, 97 U. S. 1.

It is obvious that any reference in the complaint to the summary judgment was dragged in at the last moment in a desperate effort to inflate the amount actually involved in this case ($2500 on the judgment on the counterclaim) to a sufficient jurisdictional amount.

Even if this claim involves anything of value, as pointed out hereafter, no question of substance under the United States Constitution exists as to the validity of the summary judgment. Therefore, for that reason also, any question as to the summary judgment involving nothing within the scope of Section 1331, Title 28, U.S.C.A. and any remaining claim based on the $2500 judgment rendered on the counter-

claim in the state court is obviously insufficient to confer jurisdiction under that section on the federal court.

C.

THE ATTACK ON THE SUMMARY JUDGMENT RAISES NO SUBSTANTIAL FEDERAL QUESTION UNDER TITLE 28, U.S.C.A., SECTION 1331.

Petitioners' alleged constitutional point in connection with the summary judgment apparently is based on a claim that Daniels and Hiskey were denied a right to a trial on the merits of the fact issues presented in the state court. This point has no possible substance and is frivolous. The complaint in the state court was for the enforcement of a trust. It claimed that Thomas was a trustee for certain lands and had an obligation to convey them to Daniels and Hiskey by a special warranty deed which had been refused. Shortly thereafter McMullin, as attorney for Daniels and Hiskey, wrote Thomas stating.

> "You have filed a written motion in this case informing the court that there is no material dispute regarding the facts in this case. The defendant has stated * * * that he claims no interest in the property under controversy. The defendant has tendered to plaintiffs a deed conveying the property to them, to which plaintiffs have no objection except that the deed is in the form of a quit claim and contains no warranty against voluntary or involuntary acts of the defendant which might affect the title. There is no further material issue except the question of damages which are claimed by both parties." (AR 13)

Thereafter in connection with the third counterclaim the District Court directed Thomas to give a quit claim deed to Daniels and Hiskey, which was done, and Daniels and Hiskey accepted the deed. Thereafter Thomas filed a motion for a summary judgment directed to the complaint in the state court under Colorado Rule 56, which for this purpose is substantially identical with Federal Rule 56. This motion for summary judgment, for purposes of the motion, in effect admitted the allegations of the complaint and squarely presented legal problems of local law to the court,

on which there was no fact issue involved, that Thomas, as trustee, having offered a quit claim deed, had no further obligation to Daniels and Hiskey. On this motion there was no occasion for the court to take testimony. The court concluded the issues of law against plaintiffs, which were wholly matters of local law and involved no federal constitutional question. The Supreme Court of Colorado affirmed. Any question that a federal constitutional right was impaired by refusal to take testimony to prove admitted facts is frivolous. Where a constitutional claim is so unsubstantial no question arises under the Constitution within the meaning of Section 1331, Title 28, U.S.C.A.

Newbury Port Water Co. v. Newbury Port, 193 U. S. 561.

Water Service v. Redding, 304 U. S. 252.

Levering & Garrigues Co. v. Morrin, 289 U. S. 103.

Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436.

Even if a serious contention could be made that fact issues were involved and the summary judgment was incorrectly granted for that reason, neverthless, it was up to the state court hearing the matter to determine whether there were any such fact issues involved, and if the court determined that there were no fact issues involved, an erroneous determination to that effect by the court raises no substantial constitutional question.

Wagner Electric Manufacturing Co. v. Lyndon, 262 U. S. 226.

Bell Telephone Co. v. Pennsylvania PUC., 309 U. S. 30.

It was incumbent upon plaintiffs to raise in the review proceeding before the Colorado Supreme Court all errors which they claim were committed in the lower court, including a determination as to whether there were or were not fact issues in dispute. Since the state courts at all times

had jurisdiction of Daniels and Hiskey, who brought the action, and determined there were no issues of fact and decided the legal questions involved and the matter was appealed to the Supreme Court of Colorado and affirmed there without written opinion, and the Supreme Court of the United States denied a writ of certiorari, Daniels and Hiskey have had their day in court as to whether any disputed material fact existed, and no federal court has any jurisdiction to review such judgment.

American Surety Co. v. Baldwin, 287 U. S. 156.

Grubb v. Public Utilities Com., 281 U. S. 470.

Rooker v. Fidelity Trust Co., 263 U. S. 413.

Angell v. Bullington, 330 U. S. 183.

Parnacher v. Mount, 207 Fed. 2nd 788 (10th Circuit).

It is interesting to note that in the petition for a writ of certiorari to the Supreme Court of Colorado (Case 718, October Term, 1953) filed by Daniels, Hiskey and McMullin, no claim of any kind was made that anyone was deprived by any court of any constitutional rights because of the summary judgment. The question presented in that petition was stated on page 18 as follows:

> "The principal question presented is whether a judgment against three debtors, made, as to one of the judgment debtors without a claim or demand for its entry, without notice, without evidence, without a hearing or a trial, and without an opportunity given to object to it, can, as to such judgment debtor, be a valid judgment, in view of the due process of law clause in the 14th Amendment to the Constitution of the United States.
>
> "A secondary question presented is whether a judgment which for reasons such as are stated in the preceding paragraph, is invalid as to one of three judgment debtors, against all of whom a single judgment is entered, and whose separate individual liabili-

ties can not be ascertained by reference to the record, must be held to be invalid as to all three of them."

The judgment referred to in the above court was the judgment against Daniels, Hiskey and McMullin for $2500 on the counterclaim, not the summary judgment.

D.

THE ATTACK ON THE JUDGMENT ON THE COUNTERCLAIM FOR $2500 RAISES NO SUBSTANTIAL FEDERAL QUESTION UNDER TITLE 28, U.S.C.A., SECTION 1331.

The claim on which the judgment on the counterclaim was created was a traditional bill in equity brought by a trustee for instructions against Daniels, Hiskey and McMullin, who were made parties thereto, and for payment of his costs and expenses in connection with obtaining the instructions. The counterclaim included a prayer for "such other and further relief as to the court might seem proper." (AR 36-37)

This being a traditional bill in equity the relief which could be granted would be that which was appropriate in the case after the proof was in and was to be determined when the final decree was entered. This rule is confirmed by the Colorado Rule of Civil Procedure 54, which for this purpose is identical with Federal Rule 54, providing in substance that every final judgment shall grant the relief to which the party is entitled even if such relief is not demanded in the pleadings.

The granting of a personal judgment against beneficiaries of a trust for costs and expenses incurred by a trustee in conducting unnecessary litigation which the beneficiaries have caused is within the relief which can be granted under such a bill.

Re Atwoods Trust, 227 Minn. 495, 35 N.W. 2nd 736.

Wilson v. Whitehead, 181 Va. 960, 27 N.E. 2nd 213.

The Colorado courts had full right to adopt such a rule as a matter of local law without raising a constitutional question.

McMullin was made a party to the amended counterclaim. During the proceeding the District Court, with McMullin's consent, instructed Thomas, as the trustee, to issue a quit claim deed to Daniels and Hiskey and the court determined in that order that McMullin then had no interest in the property involved in this action. Petitioners now claim that the effect of this order was to dismiss McMullin as a party to the action but they are careful not to allege that the order did dismiss him, but it did not. He remained as a party to the counterclaim and subject to final judgment which might be entered thereon. If he disclaimed an interest in the property, which he had a right to do, and then ceased to take an active interest in the case (except as attorney for the other plaintiffs) he took his chances that he had properly appraised the case and that all issues that might involve him had been disposed of. McMullin failed properly to appraise the situation. He remained a party and was bound by the final judgment on the counterclaim just like any other party. Any claim that any constitutional right was violated is plainly unsubstantial and no constitutional question arises within the meaning of Title 28, U.S.C.A., Section 1331.

E.

BY APPEALING TO THE SUPREME COURT OF COLORADO AND THEN SEEKING A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO ANY RIGHT, IF IT EXISTED, TO APPLY TO A FEDERAL COURT IN THIS ACTION WAS LOST.

Even if Daniels, Hiskey or McMullin had a legitimate ground for objection, either to the summary judgment or the judgment on the counterclaim based on the United States Constitution, and they might have proceeded immediately to a Federal District Court to enjoin the enforcement of the state court judgment (assuming sufficient jurisditional amounts were present), they elected not to pursue that remedy. Instead they elected to go to the Supreme

Court of Colorado and from there, if the door was open, to the Supreme Court of the United States. They had an opportunity in these review proceedings to show and have considered every question, constitutional or otherwise, affecting the lower court decision. That they did raise such constitutional question is unequivocally shown by their petition for writ of certiorari in Case 718, October Term, 1953, in this court where they stated on Page 16:

> "During the course of the foregoing argument the contention that the judgment was invalid under the 14th Amendment to the Constitution of the United States was fully and fairly presented for the consideration of the Supreme Court of the State of Colorado."

and further on page 18

> "From the foregoing it appears that the first opportunity given the judgment debtors to object to the judgment upon any ground was in the Supreme Court of the State of Colorado; that in that court the fact that the judgment was rendered in violation of the 14th Amendment to the Constitution of the United States was specifically, fully and fairly presented to the court prior to its determination of the issue."

It is, therefore, difficult to understand the mental processes which resulted in the inclusion in the amended complaint in the federal case of the statement that in the Supreme Court of Colorado no issue was raised, heard or determined as to the jurisdiction of the court to enter the counterclaim. (AR 25)

As a practical matter, even if no question under the 14th Amendment had been raised in the Supreme Court of Colorado or on the petition for certiorari, Daniels, Hiskey and McMullin had a full opportunity to raise the question there, and they can not avoid the effect of the determination of the Supreme Court of Colorado as *res adjudicata* on their proceeding in error by claiming now that they failed to raise a constitutional question there.

Cromwell v. County of Sac, 94 U. S. 351.

Grubb v. Public Utilities Com., (supra).

Chicot County Drainage System v. Baxter State Bank, 308 U. S. 371.

The cases referred to in the petition for writ of certiorari in this action as involving similar facts to the present case do not involve similar facts. *Sargent v. Grimes*, 70 F. 2d 121, involved a direct proceeding in a federal court to enjoin a judgment in a state court admittedly for more than $3000 where the proceeding was commenced in the state court immediately after the judgment was rendered, and no election was made to seek review of the judgment in the State Supreme Court.

Bell v. Hood, 327 U. S. 678, did not involve a proceeding to enjoin the effectiveness of a state judgment, let alone a state judgment which had been issued by a state trial court, and then appealed to the State Supreme Court.

F.

THE REFUSAL OF THE DISTRICT COURT TO PERMIT THE FILING OF AN AMENDED COMPLAINT PRESENTS NO GROUND FOR CERTIORARI.

The petition in this matter states that the only question involved in this case is the refusal of the District Court to permit the filing of an amended complaint. Of course, this is a matter within the discretion of the District Court. The District Court had before it, in connection with its original ruling that it had no jurisdiction, all of the facts and circumstances set forth in the amended complaint. Indeed the amended complaint incorporated the complaint and the judgment in the lower court and thus made it crystal clear that there was no substantial constitutional question involved. When the motion to dismiss for lack of jurisdiction was first heard, Daniels, Hiskey and McMullin had full opportunity to present all evidence to the District Court concerning the values involved in the claim to set aside the summary judgment. They failed to present such evidence. They could have presented it without making specific allegations as to what that evidence was. The inclusion of further allegations in the amended complaint of what they

could have proved but failed to prove when the motion was originally heard added nothing to what the court already had had an opportunity to consider. Clearly there is no abuse of discretion on the part of the District Court. Certainly no matter of importance to any one but the litigants in this case is involved here and there are no grounds for this court to grant certiorari.

G.

THERE IS NO GROUND FOR ISSUANCE OF CERTIORARI HERE.

Petitioners point out no conflict between the decisions of the courts of appeal on any point involved in this case nor do they point out any decision of this court contrary to the action of the District Court in dismissing for lack of jurisdiction a case similar on the facts to the case at bar. Certainly the situation does not present a matter of departure from any accepted and usual course of judicial proceedings within the meaning of Rule 19. There is no important question of federal law involved here which needs to be settled by this court, if it is not already settled.

See *Rice v. Sioux City Cemetery*, 349 U. S. 70.

H.

OPINION OF COURT OF APPEALS

Petitioners' brief is largely based on a criticism of the 10th Circuit Court of Appeals because of its reference to the original complaint in the District Court. Petitioners apparently are confused. They seem to feel that jurisdiction is a matter of pleading and not a matter of substance. The main question in the case is whether the District Court properly dismissed the action for lack of jurisdiction. If it did, the next question is whether the amended complaint added anything of substance not already presented to the court. In order to give intelligent consideration to the matter the Court of Appeals had to analyze the original complaint and the ruling thereon. It is true that the court through inadvertence referred to the motion which was sustained by the District Court as a motion to dismiss for

failure to state a claim. However, it is apparent from the entire opinion that the court was directing its remarks to the action the District Court actually took, and the question in this case is whether the District Court was correct.

I.

CONCLUSION

The Colorado court had jurisdiction over Daniels, Hiskey and McMullin and of the cause. Its judgment was the result of powers confirmed by local rules of procedure. The federal case obviously involved less than the jurisdictional amount and question under the Constitution was frivolous. It is simply a further effort on the part of Daniels, Hiskey and McMullin to harrass Thomas and to cause him further expense.

It is submitted that the writ of certiorari should be denied, and that Thomas have relief under Supreme Court Rule 56.

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Attorney for C. Sewell Thomas, Respondent.

1360 Denver Club Building,
Denver 2, Colorado.

Office - Supreme Court, U
FILED
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HAROLD B. WILLEY, Cle

No. 502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

PETITIONERS' REPLY BRIEF

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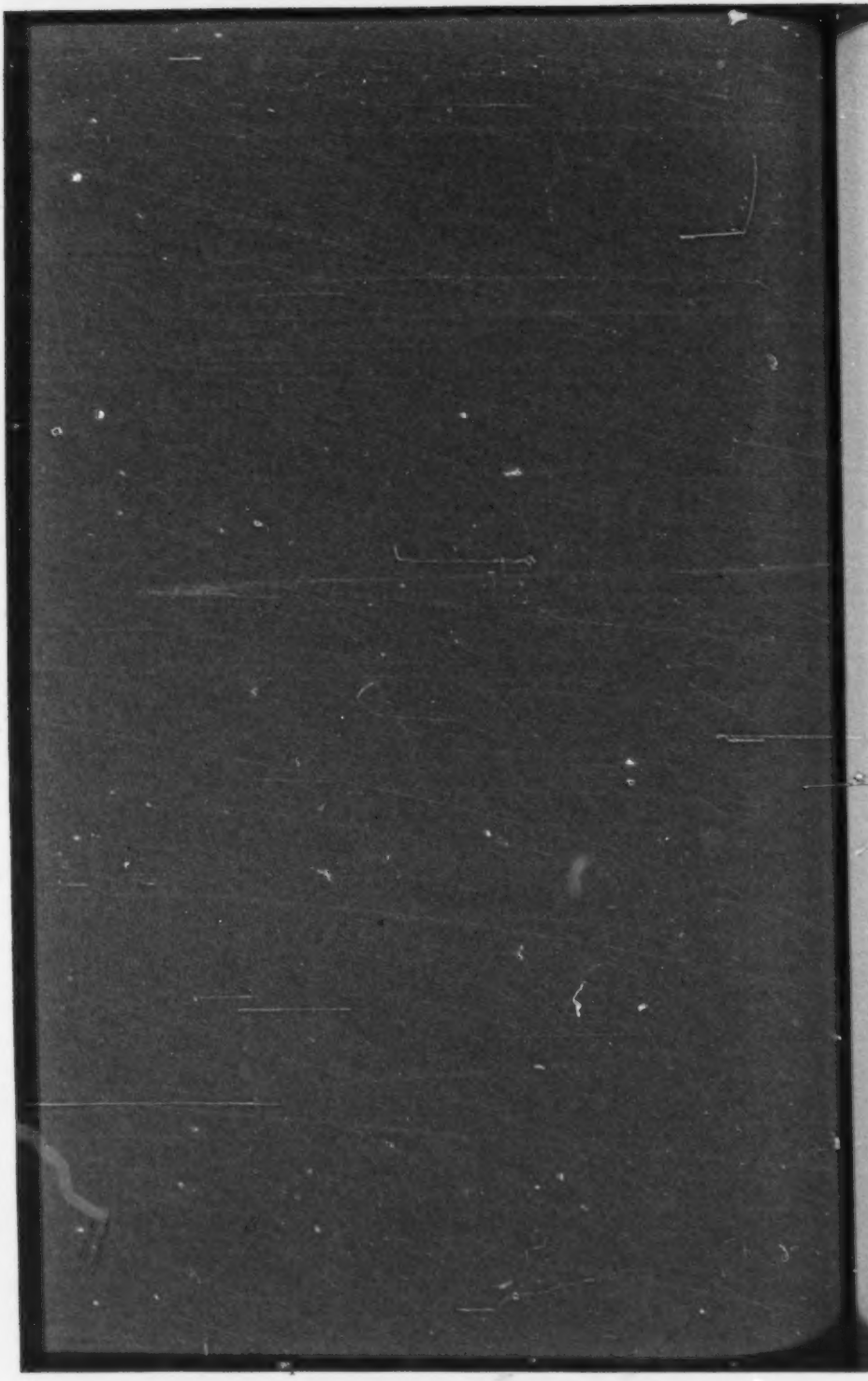

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 502

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

PETITIONERS' REPLY BRIEF

The opinion of the Court of Appeals is now reported as 225 F. 2d 795.

1. *The respondent has failed to answer our contention that this case calls for an exercise of this court's power of supervision.*

The respondent has made virtually no answer to the contention made in the petition (pp. 22-30) that the opinion of the Court of Appeals is of such a nature as to call for an exercise of this court's power of supervision.

As shown in the petition in more detail, the Court of Appeals first speaks of the case as though the question to be decided had arisen on motion to dismiss (Opinion, p. 2; see note 1). It then speaks of the case as though there had been a hearing at which evidence had been received (Opin-

Note 1. References are to the pages of the opinion as shown in the record and in the appendix to the petition.

ion, pp. 3, 5). It refers to the contentions of the parties as they are shown by the original complaint and without reference to the tendered amended complaint (Opinion, p. 4). It says that McMullin "did not ask to be dismissed from the action and was continued as an involuntary plaintiff" (Opinion, p. 3); that his disclaimer and the subsequent action of the state trial court "did not dismiss him from the action" (Opinion, p. 5) and that he "must have had" notice that a claim for judgment had been made against him (Opinion, p. 6). It declares that the respondent "did ask for a monetary recovery because of (petitioner's) conduct" (Opinion, p. 6), that the counterclaim "makes out" as claim for the relief which was granted, that is, a personal judgment (Opinion, p. 6) and that the federal issue "could have been tendered in the state trial court" (Opinion, p. 8).

In all of these respects the opinion is completely at variance with what the record shows. The opinion does not contain a correct statement of the facts regarding the litigation in the state court, and the respondent makes no attempt to show that it does. It would be impossible to do so, as has been shown by the petition.

These statements are not only inaccurate in the extreme, but they constitute a judicial determination as to how and in what manner the state court judgment was entered. The opinion declares that the state court judgment was not void and that its validity is res adjudicata (Opinion, p. 8). This statement now provides the respondent with a possible defense to any further efforts to correct the wrong which, by means of the state court action, he has inflicted upon the petitioners. The respondent can now cite the opinion as authority for the contention that the state court judgment is valid. The injustice committed by the entry of the state court judgment is probably beyond remedy unless this court exercises its power of supervision and corrects or requires correction of the misstatements of fact which are made in the opinion.

The determination of the facts in regard to the litigation and the declaration that the state court judgment is valid is made in an opinion which, at the same time,

affirms that the action must be dismissed for lack of jurisdiction. There would appear to be some inconsistency in this. If the Court of Appeals could properly determine the facts regarding the proceedings in the state court it must have had jurisdiction to do so. If it did not have jurisdiction there would be no way by which the court could make a determination as to any of the facts.

If the United States courts lack jurisdiction of the action the case should have been dismissed on that ground without any attempt to pass upon the merits of the litigation. If there is no jurisdiction nothing should be done which could possibly affect the rights of either party. If, on the other hand, the United States courts do have jurisdiction they should arrive at their conclusion regarding the case only after they have heard the evidence, and they should take into consideration the allegations in the record as to which there is no dispute. The Court of Appeals, however, has done none of these things. It has declared that jurisdiction is lacking, and yet has made a determination as to the facts; and its determination of the facts is so extremely inaccurate as to completely misstate the nature of the controversy.

The opinion which results from the erroneous action referred to is such a clear and broad departure from the accepted and usual course of judicial proceedings, and the petitioners are so utterly without remedy except at the hands of this court, that an exercise of this court's power of supervision appears to be called for. Whether the decision is right or wrong, the opinion should be corrected. Nothing in respondent's brief provides any answer to this contention.

2. *The respondent has failed to answer our contention that the rules regarding jurisdiction in cases such as the present require clarification at the hands of this court.*

The three leading decisions by which this court has held that a federal court has jurisdiction to enjoin the enforcement of a state court judgment which is void for want of due process of law were decided many years ago. *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492,

was decided in 1914; *Atchison, Topeka and Santa Fe Co. v. Wells,* 265 U. S. 101, 68 L. Ed. 928, was decided in 1923, and *American Surety Co. va. Baldwin,* 287 U. S. 156, 77 L. Ed. 231 was decided in 1932. It has been twenty-three years since this court has handed down a decision upon the question of federal jurisdiction in cases such as the present case.

Since the decision in *American Surety Co. v. Baldwin* much uncertainty and confusion has arisen regarding the circumstances under which relief can be given in the federal courts from state court proceedings in which the requirement of due process of law has not been observed. This uncertainty and confusion extends even to the decisions of the federal appellate courts themselves. For example, since the decision in the *Baldwin* case was rendered, seven of the federal appellate court decisions which were cited in the opinions in the present case (A.R. 18; Opinion, p. 4), and one additional similar case not previously referred to, *Jones v. Medlock,* infra, have been brought before this court on applications for writs of certiorari. These cases were as follows:

Borland v. Johnson, 88 F. 2d 376 (C.C.A. 9-1937); certiorari denied 302 U. S. 704, 82 L. Ed. 544 (1937).

Williams v. Tooke, 108 F. 2d 758 (C.C.A. 5-1940); certiorari denied 311 U. S. 655, 85 L. Ed. 419 (1940).

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Parnacher v. Mount, 207 F. 2d 788 (C.A. 10 - 1953); certiorari denied 347 U. S. 917, 98 L. Ed. 1073 (1954).

It will be noted that these cases have come to this court from the 4th, 5th, 9th and 10th Circuits; that the present application for a writ of certiorari is the fourth such application made in a case of this kind arising in the 10th Circuit; and that applications for writs of certiorari in such cases have been made at fairly regular intervals during the entire period since 1932. This, we believe, is due to the lack of a clear and comprehensive statement of the limits of federal jurisdiction in this class of cases.

The fact that seven of the above cases have been cited at all by the lower courts in the present case shows in itself a certain confusion and uncertainty regarding the question, because, as shown in the petition (pp. 14-15), the questions decided by these cases are not at all the question which is presented by the case at bar. The confusion is emphasized by the fact that two of the cases cited by the Court of Appeals in support of its determination that jurisdiction is lacking in the present case—namely, the *Spencer* and *Parnacher* cases just referred to, both of which, incidentally, arose in the 10th Circuit—were cases which were themselves disposed of on the merits, in the exercise of jurisdiction, and on considerations of res adjudicata. They make no reference to any lack of jurisdiction. The remaining cases do refer to lack of jurisdiction and hold that where state court proceedings are merely erroneous and not absolutely null and void, and where the federal question has been fully litigated in the state courts, the federal courts are without power to interfere. The *Williams* and *Hendron* cases say that under such circumstances the fed-

eral action is appellate in nature so that the federal district courts, having no appellate jurisdiction, are powerless to act. The decision of the federal trial court in the present case was based in part upon this reasoning (A.R. 17, 43), although the present case is not appellate in nature. In the case of *Bell v. Hood,* cited below, this court questioned the use of the word "jurisdiction" at all in such cases, which leads us to suggest that it may be principles of comity, or respect for the proceedings and judgments of the state tribunals, which is what really prevents federal action in such cases. The whole subject would seem to need further consideration.

The confusion in the decisions further appears from the fact that notwithstanding the action taken in the present case, the Circuit Court of Appeals for the Tenth Circuit had previously decided on the merits and had thus exercised jurisdiction in the almost identical case of

Sargeant v. Grimes, 70 F. 2d 121 (C.C.A. 10—Colo.—1934).

The respondent has made no effort to explain or reconcile these diverse opinions and viewpoints, and we do not see how it would be possible to do so.

3. *The respondent has failed to show that jurisdiction should be denied because of lack of merit in petitioners' claim.*

If the allegations of the tendered amended complaint are true, the case is within the federal jurisdiction; the matter in controversy is alleged to exceed the jurisdictional amount, and the outcome of the case depends entirely upon a proper interpretation of the 14th Amendment.

The respondent attempts to avoid this conclusion by denying that the facts alleged in the tendered amended complaint are true, and by attempting to show that in any event no recovery can be had. Discussion of the merits, however, is out of place at this stage of the proceedings. The amount claimed in good faith, and not the amount ultimately recovered, is the amount in controversy.

Barry v. Edmunds, 116 U. S. 550, 560; 29 L. Ed. 729 (1886).

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 288; 82 L. Ed. 845 (1938).

A federal question is present if determination of the issues depends upon the interpretation and effect to be given the Constitution, laws or treaties of the United States, regardless of the result arrived at.

Bell v. Hood, 327 U. S. 678, 682; 90 L. Ed. 939 (1946).

Nevertheless, lest we appear to fear discussion of the merits, the following reply is made to respondent's argument.

The Court of Appeals was apparently satisfied that the jurisdictional amount was present. There was only one judgment in the case; the summary judgment was a mere interlocutory order (A. R. 23, par. 12; 24, par. 15). It is with the total effect of this single judgment that we are concerned. No proof of the amounts involved was necessary because the respondent himself furnished the proof as to $3,500.00 of the amount involved. He informed the court that the money judgment was for $2,500.00 (A.R. 8) and he furnished the court with a copy of the complaint in the state court action (A.R. 9) which verified the allegation (A.R. 21, par. 4) that petitioners Daniels and Hiskey claimed damages in the sum of $1,000.00. The allegation as to the value of the conveyance was never traversed.

A substantial federal question remains even if everything which the respondent says were to be admitted. The respondent does not deny that Daniels, Hiskey and McMullin owed him nothing, that McMullin had no notice of any claim for liability and that Daniels and Hiskey had no notice of any claim for personal liability, and that no evidence in support of a personal judgment was received or heard (A.R. 23, par. 13; 24, par. 14). This is sufficient lack of due process to invalidate the judgment, as the petition shows (pp. 16-17). Judgment cannot be entered on a bill in equity relating to trust property without notice or demand any more than it can in any other kind of proceeding.

Rude v. Buchholter, 286 U. S. 451, 460; 76 L. Ed. 1221 (1932).

The 14th Amendment applies even where the court otherwise has jurisdiction.

Fayerweather v. Ritch, 195 U. S. 276, 297; 43 L. Ed. 193 (1904).

Not being a party to the litigation, no judgment could properly be entered against McMullin.

Chase National Bank v. Norwalk, 291 U. S. 431, 441; 78 L. Ed. 894 (1934).

This remains true even though upon the trial he may have been in the court room representing the other petitioners. By representing a client an attorney does not become a party to the proceedings.

The claim is not barred as being res adjudicata. Res adjudicata does not apply to this case. The parties in the present action are not the same as the parties were in the action in the state courts (A.R. 37). The issues are not the same. It is the doctrine of collateral estoppel which applies, and therefore only those issues which were actually litigated and adjudicated in the state court action are barred in the present case, as shown in the petition (p. 21). The tendered amended complaint, verified under oath, declares that "there has been no prior adjudication or determination" as to whether the state court judgment was entered without jurisdiction or as to whether it was void (A.R. 25, par. 19). If the action in this court is barred by the former adjudication in the state court, that must be shown by the respondent, who has the burden of proof. He must show that the issue now under consideration, namely, whether the state trial court had jurisdiction, was actually litigated and adjudicated by the state courts. The verified tendered amended complaint alleges that this proof cannot be made, and we stand on that allegation. There can be no question that the issue of jurisdiction is not raised merely by the contention that the judgment was erroneous because of non-compliance with constitutional requirements, even if that claim was properly made in the state court proceedings, as to which the Court of Appeals says (Opinion, p. 8):

"The record is not clear whether such issue was in fact presented in the state court action". The issue presented in this case is the issue of jurisdiction. We say that that issue has never before been presented to any court, and the proof will sustain this contention.

Relief from state court proceedings which lack due process of law has frequently been denied because, as the federal courts have said, the aggrieved party should have applied to this court for a writ of certiorari to review the judgment of the state court. In the present case such an application has been made and has been denied. This leaves petitioners without remedy except by a direct proceeding upon the issue of jurisdiction. Presumably the application for a writ of certiorari to review the state court judgment in the present case was denied by this court because in its opinion the federal question had not been properly raised in the state proceedings. If this is true it requires a determination that the federal question was not raised in the state courts in such a way as to bar relief in the present proceeding. Relief should not be first denied on the ground that the federal question was not raised, and then be denied later on the ground that it was.

A long line of authorities cited in the petition (pp. 19-20) holds that "affirmance of a void judgment on grounds not touching but overlooking the invalidity does not make it valid."

Respondent refers (Brief, p. 8) to a letter written in 1948 and set out in full in the record (A.R. 10-12), in which petitioners Daniels and Hiskey said that since respondent had stated that there was no material issue in dispute, and since he had tendered a deed to the property, they would like to settle the litigation. The respondent did not act on this offer in compromise but withdrew the tender of the deed (A.R. 31, par. 4). We do not believe that this has anything to do with the question of jurisdiction.

The federal courts are properly reluctant to interfere where the state courts have acted, but the constitution places a limit upon the action of the state courts which the federal courts are bound to enforce wherever necessary. There is not the slightest factual basis for the judgment

which is involved in the present case, and that judgment was entered in clear and direct violation of the constitutional guarantee of due process of law and without jurisdiction. The respondent has failed to show that the federal courts are unable to prevent the enforcement of such an unconscionable and unlawful purported judgment.

4 *Conclusion.*

For the reasons stated, the petitioners pray that the writ may be granted.

Respectfully submitted,

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Address:
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December 7, 1955.

JAN 13 1956
HAROLD B. WILLEY, Clerk

No. 302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

PETITION FOR REHEARING

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PEERLESS PRINTING CO., DENVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 502

OMRI E. DANIELS, JR., BARGE HISKEY and BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS,

Respondent.

PETITION FOR REHEARING

Your petitioners pray that a rehearing may be had upon the order denying their petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, entered herein on January 9, 1956.

The grounds for this petition are that the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit were without power or jurisdiction to enter their respective judgments for the reasons and upon the grounds and in the manner stated in their opinions. In an action in which it is held that the federal courts are without jurisdiction, those courts have made determinations of questions both of law and of fact which relate to the merits of the controversy, and which those courts were powerless to make

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Note: References to page numbers of the opinion of the Court of Appeals refer to the original paging shown in the record and in the appendix to the petition for a writ of certiorari.

in the absence of jurisdiction. These determinations have no bearing at all upon the question of federal jurisdiction and they are of such a nature as to prejudice the rights of the petitioners to seek relief in a court which does have jurisdiction and by a proceeding which calls for a proper exercise thereof. The erroneous action of the two lower courts can now be corrected only by the action of this court itself. These grounds have never been previously presented in this proceeding.

Both the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit held that the claim presented in this action was not within the jurisdiction of a United States District Court. The District Court ordered the claim dismissed for lack of jurisdiction and the Court of Appeals affirmed the dismissal for the same reason. Both decisions hold that the federal courts lacked jurisdiction of the controversy.

In the interest of brevity we will discuss only the opinion of the Court of Appeals. The questions presented by that opinion are a sufficient basis for this petition, and what is said regarding that opinion applies equally to the opinions rendered by the District Court (A. R. 14, 41).

If these decisions are correct it necessarily follows that the Court of Appeals was without power or jurisdiction to affirm the judgment of the District Court upon the grounds and for the reasons and in the manner set forth in its opinion. Jurisdiction is the power to hear and determine. If there is no jurisdiction, there is no power to hear and no power to determine. A court which has no jurisdiction is without power to pass upon the merits of the controversy. If jurisdiction is lacking the sole power which the court has is to determine that it does not have jurisdiction. If there is no jurisdiction the court can take no steps and can make no determination which will in any way affect or prejudice the rights of either party to the litigation. Certainly a litigant who comes into a court which has no jurisdiction of the controversy should leave that court with his rights unimpaired. Denial of jurisdiction should leave a litigant as free to seek relief elsewhere or in an-

other form of action as he was before he applied to the court which had no jurisdiction.

In the present case these principles were violated. The Court of Appeals affirmed the dismissal of this action for want of jurisdiction upon grounds and for reasons and in a manner which, by its own decision, it was prevented from doing. The action taken by the Court of Appeals cannot fail to prejudice the rights of petitioners to secure relief in another forum or form of action. Petitioners have come into a court which has declared that it does not have jurisdiction only to find that that very court has exercised jurisdiction in such a way as to impair their right to eventual relief from the iniquitous judgment which has been obtained against them in the state court.

Specifically, the Court of Appeals has in effect declared that it has disposed of the case upon the merits. It has said that the case arose upon a motion to dismiss for failure to state a cause of action (Opinion, p. 2), so that its opinion now carries the weight of a decision upon the merits of the legal questions involved. It speaks of the case as though there had been a hearing at which evidence was received (Opinion, pp. 3, 6), thereby implying a determination upon the merits. These statements are not only not supported by the record, as was shown by the petition (pp. 22-23, 27), but, in addition to that, as we now show the court, the Court of Appeals was powerless to pass upon the merits if, as it says was the case, it had no jurisdiction of the controversy.

The opinion declares that petitioner McMullin did not ask to be dismissed from the state court action (Opinion, p. 3), and that he was not dismissed from the action but remained a party subject to the determination of the right of respondent to recover damages (Opinion, p. 5). The opinion also states that he had notice of the entry of the judgment in the state court (Opinion, p. 6). All of these matters go to the merits of the controversy. They have nothing to do with the question of federal jurisdiction. Not one of these statements is supported by the record, as is shown by the petition (pp. 23, 26-28), and, in addition, as we now show the court, the Court of Appeals was without power to make any determination as to these matters.

All of these statements constitute a determination of matters which go to the merits of the controversy and since, under the ruling of the Court of Appeals itself, jurisdiction was lacking, there was no jurisdiction to make such findings or determinations. All of these findings are prejudicial to any further efforts on the party of petitioner McMullin to seek relief from the state court judgment. They amount to a virtual determination that, as far as he is concerned, the judgment was valid.

Similarly the Court of Appeals declares and determines that respondent Thomas asked for a monetary recovery against petitioners because of their conduct (Opinion, p. 6), and that the state court judgment was not beyond the scope of the issues raised by the pleadings in that action (Opinion, p. 6). We have attempted in our petition (pp. 28-30) to show that neither of these statements is supported by the record, and we show here that, in addition, the Court of Appeals had jurisdiction to make neither of them. Both of these determinations were utterly beyond the power and jurisdiction of the Court of Appeals if that court had no jurisdiction of the controversy. They had nothing to do with the question of jurisdiction, and both of these determinations will prejudice the rights of petitioners in any further litigation regarding the validity of the judgment in question.

Finally, the Court of Appeals declares that the issue of the validity of the state court judgment is res adjudicata (Opinion, pp. 7, 8) and that the state court had jurisdiction both of the subject matter and the parties (Opinion, p. 8). These fundamental issues are at the very heart of the controversy and could not be so much as considered by a court which had no jurisdiction of the action. The determinations are not only without foundation and are not only incorrect, as we attempted to show throughout our entire petition, but, since they go to the merits, they are without the jurisdiction of a court which says that it has no jurisdiction of the action. It needs no argument to show that such statements are prejudicial to the right of the petitioners to be free from the unlawful judgment of the state court.

In all of these particulars the Court of Appeals has exceeded its own declared lack of jurisdiction to the prejudice of the petitioners. The resulting injury to the rights of the petitioners cannot be corrected except at the hands of this court. The opinion of the Court of Appeals and the statements which it has made concerning the case are not subject to review by any tribunal other than the Supreme Court of the United States. No court but this court can make or require to be made the corrections which are necessary to relieve petitioners from the effect of the statements, findings and determinations which, if the Court of Appeals lacked jurisdiction, it was powerless to make.

As the result of the decision of the Court of Appeals the petitioners find themselves in this position: They have applied to a federal court for relief, and relief has been denied them on the ground that the federal court was without jurisdiction. If that is true the petitioners should at least have been left where they were when they made their application for relief. Their right to seek relief elsewhere or in a more appropriate action should not have been impaired or damaged by the determination of a court which held that it had no jurisdiction of the controversy. No action should have been taken by the federal courts except to make the single determination that those courts were without jurisdiction. That is all which, under their own decisions, the federal courts had the power to do. But the federal courts did not limit their action to a simple determination of the question of jurisdiction. Both the District Court and the Court of Appeals have gone into the merits of the controversy, and although they have declared that they have no jurisdiction to grant relief to petitioners, by going into the merits they have exercised jurisdiction sufficiently to deny relief to petitioners in any subsequent proceeding.

This is not a proceeding in which the parties have had a hearing, and in which the result arrived at, however erroneous it may be, is at least the result of a judicial determination of the controversy, so that the parties have had their day in court, and so that this court may justifiably leave the decision undisturbed. In this proceeding the

courts have exceeded their power and jurisdiction, their action is not of a judicial nature, and in the proper administration of justice this court can hardly fail to take notice of this and apply the necessary remedy.

In view of the extreme departure from normal judicial procedure which is disclosed by the record in this case, and which is now brought to the attention of the court by this petition, it would seem that the writ of certiorari prayed for should be issued.

Respectfully submitted,

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January 17, 1956. *Counsel for Petitioners.*

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CERTIFICATE OF COUNSEL

I do hereby certify that the foregoing petition for rehearing is made in good faith and not for delay and that this petition is restricted to matters permitted to be included therein by Rule 58 (2) of the Rules of this court, namely, to substantial grounds available to petitioners although not previously presented, which are that the lower courts were without power or jurisdiction to render judgment in this case upon the grounds and for the reasons and in the manner set forth in the opinions of those courts.

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Counsel for Petitioners